Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Georges Cairns et al.,

complainants,

and

Teamsters Canada Rail Conference (formerly International Brotherhood of Locomotive Engineers),

respondent,

and

Canadian National Railway Company; VIA Rail Canada Inc.,

employers.

Board File: 24865-C
Neutral Citation: 2011 CIRB 575
March 29, 2011

The Canada Industrial Relations Board (the Board), composed of Mr. Andrew C. L. Sims, Q.C., Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*), considered the above-noted matter. Numerous hearings and teleconferences with the parties were held over a period from February 2005 to September 2008.

Counsel of Record

Mr. Michael A. Church, for George Cairns et al.;

Mr. James L. Shields, for the Teamsters Canada Rail Conference (formerly International Brotherhood of Locomotive Engineers);

Messrs. Barry Hogan and John A. Coleman, for the Canadian National Railway Company;

Ms. Louise Béchamp, for VIA Rail Canada Inc.

I–Introduction

[1] This decision concerns the remedies to be afforded certain employees or former employees (the Cairns Group or the complainants) of VIA Rail Canada Inc. (VIA or VIA Rail) following their successful pursuit, against their bargaining agent, of a complaint of a failure to represent them fairly under section 37 of the *Code*. As explained below, the Board has already ruled that the remedy may also run to their employer, VIA Rail, although no apportionment of liability between VIA and the union has been set.

[2] Earlier Board rulings sought to have the parties negotiate new collective agreement terms to rectify a breach of the *Code*. These efforts failed, leading the Board to an alternative remedy, providing for a mix of damages and remedial orders, given what was, by then, the impracticality of unscrambling the various seniority, job and recall rights and the unavoidable (by that point) impact on third parties. The issue now is what principles should govern such a damages remedy and how they are to be applied to five representative cases.

[3] VIA Rail runs passenger trains. The employees operating the trains are called "the running trades." There used to be one group of employees called the locomotive engineers, and another group called the conductors. Each group had related classifications, but for now these broad categories are sufficient.

[4] Before VIA, the Canadian National Railway Company (CN) and the Canadian Pacific Railway (CP) provided Canada's passenger services. Historically, the engineers group fell within bargaining units represented by the International Brotherhood of Locomotive Engineers (the BLE). The conductors fell within the other running trades bargaining units, then represented by the United Transportation Union (the UTU).

[5] There were thus two trades represented by two separate unions with separate bargaining units, trade jurisdictions, and seniority rankings, more tied to the person's time in their bargaining unit than to their date of hire with VIA.

[6] The BLE is now part of the Teamsters Canada Rail Conference (the TCRC). While the Board's files have been amended to recognize that development, this decision will continue to refer to the TCRC as the BLE, because so many of the earlier decisions and references do so (see *VIA Rail Canada Inc.*, 2007 CIRB 381 (Decision 381), at paragraph 12).

[7] When VIA took over responsibility for passenger service, it did so subject to certain regulatory and legislative conditions. For a while, VIA obtained its running trades from the other railways, one of which, CN, was still at that point, a crown corporation. However, in 1987, VIA decided to hire its own running trades. When it did so, it maintained the same historic distinction between conductors and locomotive engineers. It became the successor to CN, and stepped into CN's shoes as far as these two running trades' collective agreements were concerned.

[8] In addition, an agreement was reached on March 6, 1987, that provided circumstances where employees at CN might elect to take work at VIA and VIA employees might elect to return to work at CN ("flow-back"). This agreement, about which more will be said later, is a key, and complicating, factor in understanding the dispute now before the Board. It meant many employees continued to hold seniority not just in their own bargaining unit at VIA, but also within a CN bargaining unit.

[9] In 1997, VIA Rail faced a reduction in its government operating subsidy. It developed a strategy to reduce its annual expenses by $15 million, mostly by reducing the number of employees. This was called the New Era Passenger Operation initiative (NEPO). NEPO involved merging the locomotive engineer and conductor positions, while transferring some on-board hospitality work to a new and different type of employee.

[10] When NEPO was announced, VIA had two collective agreements; one for the locomotive engineers with the BLE and one for conductors with the UTU. VIA Rail asked the CLRB to merge its two running trades bargaining units into one. At about the same time, VIA gave notice to both unions that it was creating a new classification of operating engineer and eliminating a series of existing positions. These were called "Notices of Material Change." The Board, at the time, described what was taking place as follows:

> The applicant indicated however its intention to abolish the two current classifications of locomotive engineer and conductor (for ease of explanation, we shall not refer separately to the related classifications which may be found in each unit, and which will also be affected by this change), and to create a new classification of "operating engineer," whose duties will include the present duties of locomotive engineers and most of the present duties of conductors and related classifications. Some (approximately 30%) of the latter duties are intended to be assigned to "on-board services" employees, members of another bargaining unit, represented by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada). The composition of that unit is not directly affected by this application. From a practical standpoint, this contemplated "merger" of classification is likely to result in the loss of some 250 running trades positions and in the creation of some 70 positions in the services positions. At present, while all members of the engineer unit would be qualified to perform the contemplated functions of the combined classification of "operating engineers," it was established that only 5% of members of the conductors unit would be so qualified.
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> (*VIA Rail Canada Inc.* (1997), 104 di 67; and 38 CLRBR (2d) 124 (CLRB no. 1206), pages 69; and 126)

[11] The concurrency of the classification merger and consequent loss of 250 running trade positions, and the proposed merger of bargaining units, created a practical problem, which the Board addressed:

> ... If the employer does implement the new job classification—and it has, pursuant to its collective agreements with both the BLE and the UTU, given "notice of material change" to each union—then the present bargaining units would be both redundant and anomalous. Both the BLE and UTU bargaining units would be devoid of members, and the "operating engineers," whether individually members of the BLE or of the UTU, would not come within any presently existing bargaining unit. There would be no certified bargaining agent authorized to negotiate a fair and orderly transition from the existing running trade positions to the newly created positions of "operating engineer." ...
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> (*VIA Rail Canada Inc. (CLRB 1206)*, *supra*, pages 69–70; and 126)

[12] The Board felt the new classification would appropriately fall into one single bargaining unit rather than the existing two. To allow current employees a choice of bargaining agents, it took a vote, which the BLE won. A new certificate was issued to the BLE on October 31, 1997 (Order no. 7314-U), giving it collective bargaining rights covering all the running trade employees, anticipated to be combined in the one "operating engineer" classification (a term since changed back to "locomotive engineer"). Writing before the vote, about the task of whichever union won the vote, the Board observed:

> Whatever the outcome of the vote in this matter, the employer, the successful trade union and many of the employees will be placed in difficult positions, and negotiations between the employer and the successful trade union (which will then be representing many employees whose qualifications to perform the

> functions of the combined classification of "operating engineer" differ) will necessarily be difficult and delicate. It is important to note that the employer has recognized that significant and expensive training—in particular, training of many conductors to carry out the tasks of engineers—will be required in order to ensure, in as much as this is possible, that members of both groups of affected employees will be afforded comparable employment opportunities.
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> (*VIA Rail Canada Inc. (CLRB 1206)*, *supra*, pages 73; and 130)

[13] Once certified, the BLE negotiated a collective agreement with VIA to cover the newly consolidated unit. That agreement contained an Appendix called the Crew Consist Adjustment Agreement (CCAA), setting out the basis on which NEPO would be implemented. That meant deciding which 250 employees would become operating engineers and which, roughly, 250 employees would lose their jobs. It meant choices had to be made between those who were trained and those who were not, between those who were formerly locomotive engineers under the BLE agreement and those who were conductors under the UTU agreement, and between those who had flow-back rights to return to CN and those who did not. For the 250 employees who would be displaced, it meant negotiating the conditions of their termination, which involved a severance package and an early retirement option.

[14] The collective agreement, and particularly the CCAA, favoured the locomotive engineers at the expense of the conductors. The Cairns Group of conductors felt they were denied the opportunity to train as locomotive engineers and that the seniority provisions were inadequate in any event to protect their interests since, if, and only once trained, they would be placed at the bottom of a locomotive engineers' seniority list. They felt, and this Board agreed, that their seniority ought to have been dovetailed from the outset with members of the earlier BLE unit. At the time, the conductors faced loss of employment with no guarantees or certainty as to their flow back rights to CN. Severance and early retirement options were negotiated but many conductors felt they were unattractive. They raised several other allegations, described fully in *George Cairns*, 1999 CIRB 35 (Decision 35).

[15] Their position was summarized in a subsequent remedial decision (*George Cairns*, 2003 CIRB 230) (Decision 230) as follow:

> [5] ... In the end, all locomotive engineers, with few exceptions, were trained for the new classification (thereby maintaining their employment), while only a few conductors managed to do so. The new CCAA commenced on July 1, 1998.
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> ...
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> [7] A group of conductors took the view that the BLE had negotiated the CCAA to their detriment in favour of the existing group of locomotive engineers. This led them to file, through Mr. George Cairns, an unfair labour practice complaint pursuant to section 97(1) of the *Code* against the BLE, for having represented them in a manner that was "arbitrary, discriminatory and in bad faith in its representation of employees as a result of the merger of two bargaining units, in violation of section 37 of the *Code*."

[16] Section 37, invoked in the Cairns Group complaint, provides:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[17] The Board found that the BLE had in fact breached its section 37 obligations, and initially ordered remedies described in more detail below. Basically, it ordered VIA Rail and the BLE to reopen the CCAA and, subject to certain remedial conditions, to renegotiate that aspect of the collective agreement as it affected three topics:

> [14] ...
>
> 1.The requirement that conductors be selected for training as engineers rather than being automatically eligible;
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> 2.The loss of seniority rights due to the adoption of a "bottom down" seniority list for re-trained conductors; and
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> 3.The agreement that conductors would be eligible to "flow back" to CN without first ascertaining whether CN would allow such transfers.
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> (*VIA Rail Canada Inc.* v. *Cairns*, 2001 FCA 133; [2001] 4 F.C. 139)

[18] The Board further ordered that "in preparation for these negotiations, the BLE was ... to hire, in consultation with the conductors, a professional to assist it in designing and executing a consultative process to determine the interests of the conductors and to represent them in the reopened negotiations on an equal basis with BLE representatives."

[19] Mr. Martin Gregotski eventually became that representative. Much litigation, mediation and negotiation followed. This, in so far as it affects the outstanding remedial issues, is reviewed below. Suffice to say that, by 2003, the Board decided in Decision 230 that, for many of the claimants, an order that sought to place them in VIA Rail locomotive engineer positions would no longer be appropriate. It directed a compensation remedy instead. More litigation, at the Board and in the Courts, followed. The parties take widely divergent views on the principles of compensation that should be applied. For that reason, efforts at consensual resolution have been unsuccessful.

[20] The parties selected five complainants from those still eligible for relief that, in the complainants' view, raise issues of principle that need to be decided or clarified to enable the resolution of these claims. The five selected complainants are Mr. George Cairns, Mr. Scot Matheson, Mr. Paul Swim, Mr. Doug Dillon and Mr. Terry Wood.

[21] Despite the apparent simplicity of deciding five test cases, the task has been more complex. This litigation has been exceedingly complex. There are principled limits to the Board's powers. The parties, notwithstanding that issues have been argued, decided and then upheld by the Courts, have tended to argue these issues again as if they remained outstanding. The Board ordered that these employees be "compensated" but without full direction on the principles on which such compensation might be based. The test cases cannot, therefore, be decided without first establishing those principles. This is no easy task, given the less than settled case law on what compensation for the loss of a job covered by a collective agreement might involve.

II–STATUTORY AUTHORITY

A–Remedial Authority

[22] The *Code* gives the Board very wide remedial powers. In particular, section 99.(2) provides:

> 99.(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to

require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfillment of those objectives.

[23] The Supreme Court of Canada has said in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, on the breadth and limits of this authority:

> [55] In examining the legislation itself it is apparent that Parliament has clearly given the Canada Labour Relations Board a wide remedial role. The wording of s. 99(2) does not place precise limits on the Board's jurisdiction. In fact, the Board may order anything that is "equitable" for a party to do or refrain from doing in order to fulfil the objectives of the *Code*. In my view, this was done to give the Board the flexibility necessary to address the ever changing circumstances that present themselves in the wide variety of disputes which come before it in the sensitive field of labour relations. The aims of the *Canada Labour Code* include the constructive resolution of labour disputes for the benefit of the parties and the public ...
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> [56] The requirement that the Board's order must remedy or counteract any consequence of a contravention or failure to comply with the *Code* imposes the condition that the Board's remedy must be rationally connected or related to the breach and its consequences. This requirement is also consistent with the test established in *National Bank of Canada* v. *Retail Clerks' International Union*, [1984] 1 S.C.R. 269, which required that there be a relation between the breach, its consequences and the remedy. Section 99 also provides that the Board may remedy breaches which are adverse to the fulfilment of the objectives of the *Code*. This empowers the Board to fashion remedies which are consistent with the *Code*'s policy considerations. Therefore, if the Board imposes a remedy which is not rationally connected to the breach and its consequences or is inconsistent with the policy objectives of the statute then it will be exceeding its jurisdiction. Its decision will in those circumstances be patently unreasonable.
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> ...
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> [60] ... It must be remembered that applying a standard of patent unreasonableness does not give a board free rein to impose any remedy it wishes. For example, if a court determined that the remedy imposed by the Board bore no relation to the breach found, or was purely punitive in nature, or was adverse to the policy objectives of the *Canada Labour Code* the order could be properly found to be patently unreasonable. ...
>
> ...
>
> [68] There are four situations in which a remedial order will be considered patently unreasonable: (1) where the remedy is punitive in nature; (2) where the remedy granted infringes the *Canadian Charter of Rights and Freedoms*; (3) where there is no rational connection between the breach, its consequences, and the remedy; and (4) where the remedy contradicts the objects and purposes of the *Code*. ...

[24] Despite the variety of remedies available, at times, and this case is one of them, monetary compensation is the only available or appropriate remedy for rectifying a breach of the *Code*. The damages remedy, like any other, must still meet the remedial criteria and fall within the jurisdictional confines set out above.

[25] In *Re Tandy Electronics Ltd.* and *United Steelworkers of America et al.* (1980), 115 D.L.R. (3d) 197, leave to appeal to the Ontario Court of Appeal refused March 10, 1980, Justice Cory, then in the Ontario Divisional Court, addressed the OLRB's jurisdiction to award damages for a failure to bargain in good faith. He said, of the Board's venturing into the area of damages for a weakened ability to bargain caused by a breach:

> So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.
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> ...
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> Support for that conclusion may be drawn from those cases where damages were considered to be an appropriate remedy in certain similar industrial relation cases. For example, it has been held that in the absence of statutory or contractual restriction, an arbitrator has the implied power to award damages: see *Imbleau et al* v. *Laskin et al*, [1962] S.C.R. 338, 33 D.L.R. (2d) 124 sub nom. *Re Polymer Corp. and Oil, Chemical & Atomic Workers Int'l Union, Local 16-14*. It would seem that the implied power has been specifically granted to the Board in wide terms by s. 79(4).
>
> (pages 215 and 217)

[26] In this case, there has been no suggestion of any Charter breach. The Board's remedial order must therefore stay within the remaining three *Royal Oak* criteria:

- It must not be punitive,
- There must be a rational connection between the breach, its consequences and the remedy, and
- The remedy should not conflict with the objects and purposes of the *Code*.

[27] At this point it is necessary to review the various stages of the Board's process and the Court challenges that have been taken to that process. This is to identify what the Board and the Courts have said about the breach to be rectified and about the connection between the breach and the remedies being considered.

III–The History of the Litigation

A–The Section 18 Merger Application

[28] This case involves remedies for a breach of the duty of fair representation. However, as the parties' positions and the Board's reasons make clear, the origins of this dispute involve what was or was not done during and following VIA Rail's bargaining unit merger application.

[29] Section 18 provides:

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[30] An important Board responsibility, in the scheme of the *Code*, is to ensure that a bargaining unit is "suitable for collective bargaining" (See the definition of bargaining unit in section 3(1), as well as the Board's powers in section 16(*p*)(v) and section 27 of the *Code*).

[31] With respect to the Board's responsability, the Board said in the *VIA Rail* case:

> ... If the employer implements the proposed single running trades classification, as it is open to it to do, and as it has announced it will, then clearly all employees in that classification would have a community of interest for collective bargaining purposes, and they would all appropriately be included in the same bargaining unit.
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> (*VIA Rail Canada Inc. (CLRB 1206)*, *supra*, pages 70; and 126–127)

[32] The Board at the time considered whether the representation vote might be premature and gave considered reasons as why it should proceed when it did. It then made the observation, set out above, about the "difficult and delicate" task the employer and the successful union would subsequently face. Once again, the Board said:

> ... It is important to note that the employer has recognized that significant and expensive training–in particular, training of many conductors to carry out the tasks of engineers–will be required in order to ensure, in as much as this is possible, that members of both groups of affected employees will be afforded comparable employment opportunities.
>
> (*VIA Rail Canada Inc. (CLRB 1206)*, *supra*, pages 73; and 130)

[33] Prior to 1999, the Board had often used the section 18 power to reconfigure existing bargaining units and merge them when industrial change made it appropriate to do so, particularly where a multiplicity of bargaining units had become dysfunctional. The Board could have, but did not in the application to merge bargaining units, impose conditions or give directions for dealing with these issues. This could have involved conditions such as to access to operating engineer training for the untrained conductors, or principles around which the seniority lists might be merged, or "dovetailed." The Board might also have given some clear direction as to how the parties should resolve the claim CN's trained engineers might assert to VIA engineer jobs as they came open, based on the 1987 agreement to allow inter-corporate seniority, a concept that clearly complicates any "dovetailed" seniority list approach.

[34] The Board's powers in this area were the subject of specific comment in the report, *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995) (the Sims Report):

> We now turn to the situation where a union holds certification for a unit of employees of an employer, but the workplace or the ownership of the enterprise changes. There are four specific provisions of concern here:
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> • Section 18, when it is used to reconsider the structure of bargaining units, particularly within a multi-unit employer;
> • Section 35, which enables the Board to declare two or more entities a single employer;
> • Sections 44 to 46 which deal with the sale of businesses; and,
> • Section 47 which deals with movements from the Public Service of Canada to crown corporations.
>
> Bargaining Unit Reviews
>
> Bargaining units are living entities which expand and contract with the enterprise. Frequently, particularly with large national employers, several unions represent different segments of an employer's workforce. Sometimes, these units become dysfunctional, because of the way job classifications are divided or through the sheer number of units.
>
> The CLRB has used its general section 18 power to reconsider its own decisions to reorganize and sometimes reduce the number of bargaining units, and thus trade unions.
>
> (page 67)

[35] The Report addressed specifically the difficult issue of merging seniority lists when units are combined, and made a recommendation for specific legislation clarifying and codifying CLRB practice on this issue. It said:

> **Consequential Orders**
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> A Board decision to merge or reconfigure bargaining units generates a number of consequential actions. Sometimes, when two units get merged, employees must choose which of the former unions they want as their bargaining agent. This may even result in the merger of two unions. Complex issues like seniority lists or pension arrangements need accommodation. These issues, in the first instance, should be left to the parties to resolve by discussions or bargaining. However, the Board should have the power to resolve any issues on which the parties cannot reach agreement.
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> **RECOMMENDATIONS:**
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> **The *Code* should contain a new provision enabling the Board to reconsider bargaining unit configurations for employers with more than one bargaining unit. The section should provide that:**
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> **• applications must be commenced by an affected employer or trade union;**
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> **• where feasible, the parties be encouraged to resolve the matters before the Board, provided that the Board is satisfied that the resolutions achieved lead to units appropriate for collective bargaining;**
>
> **• applicants must satisfy the Board that there are problems with the present bargaining unit configuration that render one or more of the units within the workplace inappropriate for collective bargaining;**
>
> **• the Board be empowered to make interim orders for the conduct of its review, and for the maintenance of collective bargaining and collective agreement administration during its review;**
>
> **• the Board be given the power to make whatever consequential orders are necessary following its decision to re-establish effective collective bargaining and contract administration.**

(Sims Report, page 70; emphasis added)

[36] Parliament subsequently introduced section 18.1 which provides, in material part:

> 18.1(1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.
>
> (2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board
>
> (*a*) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and
> (*b*) may make any orders it considers appropriate to implement any agreement.

(3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.

(4) For the purposes of subsection (3), the Board may

(*a*) determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review;
(*b*) amend any certification order or description of a bargaining unit contained in any collective agreement;
(*c*) if more than one collective agreement applies to employees in a bargaining unit, decide which collective agreement is in force;
(*d*) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions; ...

[37] The significance of this commentary, and of section 18.1, is not that it was applied to this case, which it was not. It is that the concept of free collective bargaining in Canada is founded on the concept of a labour board determined "bargaining unit" that is "appropriate for collective bargaining." Much like constituencies in the electoral process, changes over time require revisions to the scope or boundaries of these constituencies. This is necessary both for effective trade union representation and for industrial efficiency. It has long been understood that when bargaining units are altered or merged, fundamental questions like seniority have to undergo some "one-time" adjustment if the reconfigured unit is to be workable, and that a "winner takes all" approach is inconsistent with the *Code*'s fundamental objectives. See the Board's fuller discussion of this in Decision 230, at paragraphs 114–123, and particularly at paragraph 18.

[38] The significance to this case is that the notion of an obligation on the parties to attend to such issues in a fair way, and an ability for a labour board to impose a remedy on both parties if they fail to do so themselves, is not inherently contrary to the *Code*'s fundamental principles. Rather, it is an essential feature of a system which depends, for its basic structure, on "bargaining units that are appropriate for collective bargaining." That concept contains within its scope the notion that the employees have sufficient community of interest to make the unit workable. Such a community of interest is difficult to obtain so long as the unit contains two or more groups with irreconcilable seniority ambitions caused by a CIRB approved merger or restructuring.

[39] As the Board's observations in the section 18 decision make clear, it anticipated that VIA and the successful union could and would address these issues themselves, mostly because of VIA's

apparent and indeed expressed intention to provide the conductors with training opportunities. At that point, as well, VIA had invoked the "material change" provisions in each of the pre-existing UTU and BLE collective agreements. That meant, if the layoff and related seniority or severance issues could not be resolved, those aspects of the dispute could be expected to be settled by arbitration. Thus, at that time, it would have seemed unnecessary for the Board to make any consequential orders as part of its section 18 merger process.

[40] What actually followed is documented in Decision 35. The BLE won the representation vote based on its majority within the enlarged unit. There had been past animosity between the BLE and UTU over the "belt pack" issue that involved some work being transferred from BLE members to UTU members. VIA was anxious to implement its NEPO initiative and tried, unsuccessfully, to do so unilaterally. The result was that the training, seniority and CN flow-back issues (described below) ended up on the bargaining table. While this meant that ultimately they could be settled through bargaining power and a strike or lockout, it also meant they would no longer be settled through the arbitration process mandated by the material change provisions of the prior agreements.

[41] As described fully in Decision 35, the BLE, by then the bargaining agent for all VIA's running trade employees, negotiated (or acceded to VIA's proposals for, depending on one's point of view) the CCAA which the Cairns Group felt was one sided and unfair to the conductors. Their complaints, in summary, were that the agreement provided inadequate training opportunities for VIA conductors; that if they were successfully trained they would be put on the bottom of the seniority list behind all the BLE engineers, both those with VIA and also those with CN, and that the agreement presumed certain reversion rights to CN that were inadequately protected. In addition, by foregoing the material change arbitration process, the former UTU conductors lost an opportunity for a neutral third party resolution to their rights on displacement and received instead the allegedly inferior severance and early retirement protections negotiated between the BLE and VIA in the CCAA.

B–CN Flow-Back

[42] At this point it is necessary to explain something about the flow-back or transfer arrangements between VIA and CN. These are detailed at paragraphs 84–95 of Decision 35. These arrangements

originate from the time when CN supplied the running trades for VIA, and a time when there were two running trades units, not one. As the Board explained at paragraphs 86–88:

> [86] When in 1987, VIA decided to run its trains with its own employees, the unions managed to protect the prior service of VIA employees transferring from CN to VIA, which allowed them to carry with them their seniority and benefits relating to prior service at CN; furthermore, they retained the right to return to CN with full credit for seniority and service time spent at VIA in certain circumstances.
>
> [87] Consequently, the Special Agreement negotiated between CN and UTU, which is the subject of this complaint, provides what is called "flow-back" rights for employees transferring from CN to VIA, allowing them to go back and forth between CN and VIA. These rights include the maintenance of employment at CN, either inside or outside the same bargaining unit, the transfer of pensions, benefit and vacation entitlements, training, relocation benefits, maintenance of earnings, separation incentives, lay-off and severance compensation, and so on.
>
> [88] Parallel to the Special Agreement between the UTU, VIA and CN, an almost identical agreement was signed between the BLE, VIA and CN with the similar purpose of tempering the adverse effects on locomotive engineers.
>
> (Decision 35)

[43] These flow-back rights are significant to this dispute and to the issue of remedy for a variety of reasons. First, they divide the conductors who were in the UTU-VIA Rail unit, and also the Cairns Group, into two; the conductors who arguably had reversion rights to CN as a result of working there in the past and the "pure VIA" employees, hired directly by VIA as conductors who therefore lacked any such reversion rights.

[44] Second, while it may initially have been assumed that CN would accept the reversion of displaced VIA Rail conductors, in fact CN hotly contested the issue, and these rights remained an unresolved question at the time of Decision 35. As the Board noted at paragraph 95:

> [95] At the date of this hearing the issue was still unresolved. The truth of the matter is that CN vociferously opposes the applicability of the Special Agreement to the type of crew reduction that VIA initiated under the material change notice of March 7, 1997. Indeed, the whole subject of flow-through rights is presently before an arbitrator [Mr. Picher] and is being heard concurrently with this matter.

[45] Third, pending the resolution of the flow-back rights issue with CN, VIA Rail agreed with the BLE, by an addendum to the CCAA, to provide interim compensation for the employees who might otherwise have flowed back to CN. In Decision 35, the Board said:

> [91] ...VIA agreed to protect the basic weekly pay or maintenance of wages for those employees whose option was to return to VIA, to provide full benefit coverage and to allow employees to accumulate seniority for pension purposes pending their return to CN. From the evidence provided to the Board, as of May 1999, some 96 former conductors were affected by the denial of transfer rights back to CN.

[46] Thus, the lost income that might otherwise have been experienced by persons who could and did elect to return to CN was initially absorbed by VIA Rail.

[47] Fourth, the flow-back agreement worked two ways. This distorted significantly the seniority issues between the VIA Rail employees. VIA Rail could have trained those former conductors who qualified, and then mixed them in with the former BLE operating (locomotive) engineers, with seniority based on their relative dates of hire or some similar criteria. This is what is called "dovetailing" the seniority lists. However, if it had done so, many of the newly trained conductors would have become senior not only to VIA's former BLE engineers, but also to all of the more senior of CN's engineers with transfer rights to VIA, many of whom may well have been hoping to obtain VIA Rail jobs based on their CN seniority. A BLE witness, Mr. Hallé explained, at paragraph 38 of Decision 35:

> [38] ... it was not possible to dovetail the locomotive engineer and conductor lists because this would have had the effect of moving a newly qualified conductor ahead of an already qualified locomotive engineer on the seniority list. Furthermore, this initiative would have an adverse effect on the 1,500 locomotive engineers at CN who were entitled to flow back to VIA through the bidding process. ...
>
> (See also the discussion of the suspension period involved, at paragraphs 38–39 of Decision 35)

[48] The fact these CN engineers also had BLE allegiances was not lost on the Board. In the Board's view, they were clearly a political force driving some of the decisions the BLE made in respect of this merged VIA Rail unit.

[49] Fifth, if as at one point contemplated, the displaced VIA conductors who returned to CN were later offered the chance to train for and take VIA Rail Operating Engineers jobs, it would cause disruptions to CN's own operations, since CN would have to fill the positions in its own ranks thus vacated.

C–Decision 35

[50] For reasons set out in Decision 35, the CIRB found that the BLE breached section 37 of the *Code*–the union's duty of fair representation. That decision ordered the following remedies:

> [130] Therefore the Board orders the following.
>
> 1. VIA and the BLE are to reopen the Crew Consist Adjustment Agreement on the following:
>
> a. the selection process for conductors and assistant conductors;
>
> b. seniority provisions as they affect conductors and assistant conductors who qualify as locomotive engineers;
>
> c. the application of the Special Agreement negotiated between UTU, VIA and CN;
>
> and any other related issues as the parties see fit with a view to providing for the interests and needs of the group of former conductors and assistant conductors. The parties are to conclude the negotiations of such amendments no later than December 15, 1999.
>
> 2. The BLE will design and hold an internal consultative process to determine these interests and needs and will hire an appropriate professional to assist the conductors and assistant conductors in this process.
>
> 3. The choice of such a professional is to be made in consultation with the conductors and assistant conductors.
>
> 4. The BLE is to bear, without the assessment of further union dues, the cost of the services of this professional.
>
> 5. The chosen professional will represent the conductors and assistant conductors for the purposes of the reopening and negotiation of the Crew Consist Adjustment Agreement, as provided above, and will share an equal voice with BLE representatives in coming to an agreement.
>
> 6. The BLE will assume, with respect to the instant proceedings, the fees of the complainants' legal counsel on a solicitor-client basis.
>
> [131] The Board reserves its jurisdiction should the parties be unable to resolve matters concerning the remedies ordered by the Board.

[51] The remedial approach adopted at that time was thus to set aside and order the renegotiation of the CCAA. The objective, obviously, was to have the parties (VIA and the BLE) with Mr. Gregotski's influence on behalf of the minority conductors, replace part of the first VIA-BLE collective agreement for the combined group with a new "CCAA like" agreement, more sensitive to the vital interests of the former conductors.

[52] In coming to its conclusions, and fashioning its initial remedy, the Board made certain findings and comments still relevant to the scope of the breach and to the remedy. The Board rejected many of the allegations put forward, but upheld three:

> [123] Based on all these considerations, the Board upholds three of the allegations:
>
> 1. the selection process for conductors and assistant conductors;
>
> 2. seniority provisions as they affect conductors and assistant conductors who qualify as locomotive engineers; and
>
> 3. the application of the Special Agreement negotiated between the UTU, VIA and CN.
>
> (Decision 35)

[53] These three matters, and the explanations then given, define the initial breach.

[54] The Board's concerns over the selection process are discussed at paragraphs 70–80. The Board found, at paragraphs 79–80:

> [79] ... there is little doubt that access to training to qualify as locomotive engineers was a crucial factor to allow conductors and assistant conductors to continue to work. Without the training, they had no other option but to terminate their employment with VIA according to one of the retirement or severance packages or return to CN (more about this later).
>
> [80] Mr. Hallé's explanation that he was sure that VIA would have a selection process since it was his view and his experience that not everyone can be trained as locomotive engineers, and this should have been understood by anyone with experience in the railway industry, does not reflect the earlier representations made to the affected membership.
>
> (Decision 35)

[55] The Board's concerns over the seniority the newly qualified conductors should receive are reviewed at paragraphs 81–83. In particular, the Board's observations at paragraphs 81–82 remain significant to the remedial issue, or at least the apportionment aspect of the remedial issue, because they indicate the different positions VIA and the BLE took, over time, to "dovetailing" the seniority list:

> [81] ... Three points came forth in the evidence. First, there is the uncontradicted statement from Mr. Scarrow that in the course of negotiations, VIA told the BLE that should the union not come to an agreement concerning the crew consist, it could and would unilaterally implement a dovetailed seniority

list. Second, there is Mr. Hallé's belief that it would be illegal to amend the VIA seniority lists because of the provisions of the Special Agreement concerning flow-back. Third, there is Mr. Hallé's concern that by agreeing to a dovetailed list, the rights of some 1,500 CN employees who have transfer rights to VIA would be affected.

[82] These issues beg several questions for which there are no answers. Why did Mr. Hallé not explore further the basis for VIA's opinion that their legal position favoured dovetailing and inquire as to other possible options? Why did the BLE not avail itself of further expertise on the effects and consequences of the Special Agreement. Why did Mr. Hallé choose to protect the rights of CN employees to the detriment of those of the conductors and assistant conductors on whose behalf the BLE was negotiating?

(Decision 35)

[56] However, the Board also said, at paragraph 126, that by drafting the CCAA with a "bottom down" seniority provision for any newly trained conductor, VIA improperly collaborated in an agreement that disadvantaged the minority conductors. It said specifically at paragraph 127:

[127] ... By proposing a bottom down seniority for the conductors and assistant conductors, it realized that it was playing into the BLE's hands, especially since its initial position was to implement a dovetailed seniority. It was also maximizing the effects of the arbitration award in its favour concerning the wording of a selection process clause to form part of the proposed agreement. It follows that it also knew or ought to have known that, by withholding clauses that limited the advancement of the conductors and assistant conductors while providing sufficient benefits to the locomotive engineers group, the proposed Crew Consist Adjustment Agreement would likely pass a ratification vote. ...

[57] The Board's findings over the uncertainty surrounding the CN flow-back agreement are detailed between paragraphs 84 and 95. Its concerns are expressed particularly at paragraph 116:

[116] What these proceedings have brought to light is the BLE's recklessness in telling the conductors and assistant conductors that they would be able to return to similar positions to CN without ensuring beforehand that these rights were indeed available. ...

...

[127] The employer was well aware of the disagreement with CN over the flow-back rights of the former CN employees and that this was not going to be resolved soon. ...

[128] To its credit, the employer accepted to continue to pay the employees who had elected or otherwise been selected by the employer until the matter with CN was decided. But the gamble remains. If CN succeeds in preventing the flow-back as a result of the Crew Consist Adjustment Agreement, the employees who relied on this provision, while trained, will no longer be able to compete for positions within VIA because of their low seniority rank.

(Decision 35)

[58] The Board also rejected the possibility of revisiting its earlier section 18 reconsideration proceedings (that is the merger of bargaining units application):

> [125] The Board made it clear at the hearing in this matter that it had no intention of reopening the previous proceedings or of ordering a new representation vote.
>
> (Decision 35)

[59] Some of the controversy that surrounded both the breach and the remedies (particularly against VIA) would have been eliminated had the Board's remedies been tied more directly to its grant of a merged unit to VIA Rail and of a certificate to the BLE. This is because, unlike the duty of fair representation which imposes a duty on the union, a section 18 application clearly affects and can impose conditions on both parties.

[60] Nonetheless, the Board explicitly found it was appropriate to grant a remedy that imposed obligations not only on the BLE as respondent, but on VIA Rail as intervenor and as party to the negotiations. In this respect, it said:

> [124] However, the Board is not satisfied that the respondent is the only liable party. When this matter was first heard on the section 18 application to review the certification of a single bargaining unit, the employer submitted that all the employees in the merged bargaining unit would be treated equally and have similar access to available positions within the bargaining unit. It was partly on this basis that the Board ordered the representation vote and issued the new certificate.
>
> [125] ... the union did not instigate the process of material change and the agreement on crew consist reductions was a contract that was to a great extent a unilateral offer on the part of the employer. This is obvious both from the point of view of the employer's unilateral decision to implement the crew consist initiative on April 26, 1998 and the final Crew Consist Adjustment Agreement dated July 12, 1998, in regard to the selection process, seniority provisions as they apply to the conductors and assistant conductors, and the application of the Special Agreement negotiated between the UTU, VIA and CN. The clauses are for all intent and purposes identical.
>
> [126] This outcome points to an improper collaboration between the employer and the respondent union to achieve a desired outcome for both parties at the expense of the rights of the minority and most affected group of employees. The Board considers such collaboration as unbecoming and contrary to section 94(1) and the spirit of the *Code*, which prohibits such practices.
>
> ...
>
> [129] These considerations bring us to the issue of remedy. This is a matter where it becomes impossible to set the clock back or to return the complainants to the situation in which they would have found themselves, were it not for the implementation of the Crew Consist Agreement. The Board also finds that while the union must bear the consequences of its actions, the remedy must involve both the union and

> the employer as they are equal players with regard to the Crew Consist Adjustment Agreement and its effects on the complainants.
>
> (Decision 35)

[61] Decision 35 was controversial in two respects. First, it applied a trade union's duty of fair representation to the union's action in negotiating the terms of a collective agreement, rather than just its representation of employees in respect of their rights under an existing collective agreement. The Board expressed the scope of the duty as follows at paragraph 107:

> [107] The duty of fair representation may also be assessed by a three-pronged test. Has the union fulfilled its institutional role in representing all its members? Were employee rights within the regime of collective bargaining appropriately protected? Were critical job interests such as seniority, discipline and job security suitably considered in the collective bargaining process?

[62] Secondly, as noted above, the Board found that while there was no initial or direct complaint against VIA Rail, it viewed VIA as complicit in the negotiations that prejudiced the Cairns Group. This, in the Board's view, justified VIA being subjected to a remedial order.

[63] The Board anticipated its remedy would result in a newly negotiated and more balanced CCAA. However, as Decision 230 later wryly observed:

> [8] This was but the opening salvo of what became a flurry of legal proceedings.

[64] Those proceedings are now canvassed to the extent they touch on the three key remedial questions: the nature and scope of the breach, the connection between the remedy and the breach, and their furtherance of the objectives of the *Code*.

D–Board Reconsideration of Decision 35

[65] The Board was asked to reconsider Decision 35. The result was succinctly and sufficiently summarized by the Federal Court of Appeal:

> [21] With respect to the second issue, the Board undertook an extensive review of the manner in which it and its predecessor, the CLRB, had interpreted s. 37. It rejected the view that the wording of the provision precluded the Board from considering issues arising from negotiations for a collective

> agreement. Considering the circumstances of the case before it, where the essential rights contained in the previous (and expired) collective agreements had been held to continue in force by virtue of s. 50 of the *Code*, the Board held that interpreting s. 37 so as to prohibit any inquiry into the termination of those rights by the negotiation of a new agreement would be inconsistent with a reasonable interpretation of that provision.
>
> [22] The Board found that the evidence supported the original panel's finding that the BLE had failed to fulfil its duty of fair representation. It held that the remedy was both rationally connected to the breach and consistent with the policy objectives of the statute.
>
> (*VIA Rail Canada Inc.* v. *Cairns, supra*)

[66] The reconsideration panel was persuaded to give the BLE and VIA Rail an opportunity to reappear before the original Vice-Chairperson to provide additional evidence. This occurred, but without altering the result.

E–First Federal Court of Appeal Review

[67] VIA Rail and the BLE challenged all three CIRB rulings. The Court initially granted a stay of the original remedial order which was only lifted once the Court's decision, upholding the Board rulings, was issued on May 2, 2001. The reasons opened by describing the two controversial issues noted above:

> [1] These three related applications for judicial review of decisions of the Canada Industrial Relations Board ("CIRB") raise two important issues: does the duty of fair representation owed by a union to its members extend to its approach to collective bargaining after the expiry of a preceding collective agreement; and, if it does, are the Board's remedial powers broad enough to require a union and employer to reopen certain aspects of the agreement arrived at in the event that the union has failed in its duty of fair representation. ...
>
> (*VIA Rail Canada Inc.* v. *Cairns, supra*)

[68] The Court began with an analysis of the standard of review (see *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.)) which, under the then applicable standards, was found to be the most deferential standard of only interfering in cases of patent unreasonability. On the first issue, the Court reviewed in detail the reasoning in the CIRB's reconsideration decision (see *George Cairns*, 2000 CIRB 70), which upheld a broad interpretation of section 37. The Court noted that the reconsideration panel's interpretation involved a consideration of the values enshrined in the *Code*:

> [49] ... "In many cases the protection of the negotiation process may be the determinative value. But it is not the only value in the *Code* and the words of section 37 must be interpreted in the context of other applicable provisions as they are understood in consideration of the realities of industrial relations..."
>
> [50] ... "In *VIA Rail Canada Inc.* [(1998), 107 di 92] the CLRB noted that while the collective agreement had technically expired, its essential content continued in force pursuant to the freeze provisions of the *Code* until effective negotiations to resolve the very outstanding issues now in dispute had been concluded. It is very doubtful, if in these circumstances, and in the context of the other relevant statutory provisions, including section 50 of the *Code*, the Board's concern about the ensuing negotiations could ever by reasonably construed as a concern with the negotiation of an agreement outside of the Board's proper jurisdiction. Importantly, on the evidence now before the reconsideration panel, it is impossible to conclude that the anticipated effective negotiations have occurred. On this basis alone, this aspect of the request for reconsideration should be refused.
>
> The reconsideration panel is, nevertheless, also of the view that the decision of the initial panel in the instant case is in keeping with the appropriate interpretation to be given to section 37 of the *Code*. Workplace relationships in federal industries in Canada are generally, at the present time, founded on the expectation that the rights under applicable collective agreements are of a continuing nature. The notion that seniority rights, essential working conditions, the right to employment and other rights of minority employees already in existence under one collective agreement could be arbitrarily and conclusively terminated by a collective agreement supported by a narrow majority and that any inquiry by the Board as to whether this was done fairly would be prohibited by section 37's wording appears to this Board to be inconsistent with a reasonable interpretation of that section of the *Code* in the light of its statutory context as is indicated by the authorities cited above. ..."
>
> *(VIA Rail Canada Inc.* v. *Cairns, supra)*

[69] This interpretation, the Court found, was not patently unreasonable. In so doing, it faced squarely the argument that section 37 extended to the administration of the collective agreement but not to its negotiation. It reviewed the various board decisions on the question at paragraphs 44–50 and then framed the crucial question at paragraph 53:

> [53] I have no doubt that the duty of fair representation extends to the administration of the frozen matters. The question is whether this duty can extend to the union's actions during collective bargaining that takes place during the freeze period.
>
> (*VIA Rail Canada Inc.* v. *Cairns, supra*)

[70] The Court found, in paragraph 54, that extending a duty not to be "arbitrary, discriminatory or to act in bad faith" during bargaining over existing rights did not offend the principles of free collective bargaining. At paragraph 55, it went further and found an interpretation that extended the duty during the freeze period but not after impasse was reached would "be irrational and absurd."

[71] The Court then went on to consider the Board's initial remedy and whether it encroached on the principles of free collective bargaining based on the *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*, test outlined above. It concluded that the CIRB's "renegotiation remedy," extant at that time, met those standards, saying:

> [59] ... The Board found that the BLE had failed to represent the conductors fairly with respect to three specific matters dealt with in the CCAA. It was only with respect to those matters that new negotiations were ordered. The Board found that the union's breaches were the result of its failure to determine or consider the interests of the conductors during the process of negotiating the CCAA. It ordered the BLE to design a process to consult with the conductors and to hire a professional who would have an equal voice with the locomotive engineers' representative during negotiations. These measures were a rational and proportional response to the contraventions of the BLE.
>
> [60] I am unable to conceive of any more appropriate remedy, nor were VIA or the BLE able to propose one. It is true that the order will have an impact upon VIA, even though there was no finding of any contravention of the *Code* on its part. However, this impact is a necessary and inevitable result of the Board's finding against the BLE. The employer was made a party to the original complaint, and permitted to make submissions before the Board, at least in part due to the recognition that its interests might be impacted by the any eventual order.
>
> [61] ... the resulting order is wholly consistent with the *Code*'s purpose of balancing the encouragement of free collective bargaining with the protection of employees who are represented by a bargaining agent.
>
> (*VIA Rail Canada Inc.* v. *Cairns*, *supra*)

[72] The Supreme Court of Canada refused leave to appeal this decision (*VIA Rail Canada Inc.* v. *Cairns et al.* (2001), 285 N.R. 198).

F–Litigation over the CN Transfer Agreement

[73] CN initially contested its obligation to take back conductors facing layoff as a result of NEPO. VIA Rail maintained the income of affected employees, including many of the Cairns Group, while the matter remained in dispute. At this point, it is necessary to recap what happened to that issue.

[74] The BLE's failure to confirm the availability of these recall rights when signing the CCAA was one of the three aspects of the breach of section 37 cited by the Board. Also, many of the complainants in fact returned to CN once the matter was resolved, and achieved earning opportunities, and thus a degree of wage protection, as a result.

[75] The interpretation of the 1987 agreement was dealt with by Arbitrator Michel Picher who issued several preliminary and then a final award, in VIA Rail's favour, on November 25, 1999, shortly after the CIRB's Decision 35.

[76] In the course of his award, and in rejecting a request that he not proceed given the CIRB process, he said:

> ... A final and binding resolution of the dispute between the BLE and CN with respect to the alleged right of the conductors and assistant conductors to return to CN will be a facilitating factor, if not an essential precondition, to VIA and the BLE meaningfully re-negotiating the terms of their Crew Consist Adjustment Agreement. For these reasons the Arbitrator rejects the submission of counsel for CN to the effect that the decision of the CIRB has rendered these proceedings "nugatory" or that there is no alternative in the circumstances but to dismiss the BLE's dispute.
>
> ... A declaratory determination by the Arbitrator which would confirm the right of conductors and assistant conductors to return to the service of CN, assuming the success of the BLE's position before me, is not tantamount to an irrevocable election by the employees concerned which must necessarily prejudice any alternative election which they may have made or may yet make. It is merely a clarification of their right, a clarification which should bring greater certainty to the range of options ultimately available. ... The eventual clarification and shake out of rights and displacements which might ensue is the stuff of any material change in the railway industry. That should not obscure the need for resolution of the critically important dispute before me.
>
> (*Re Canadian National Railway Company* and *Brotherhood of Locomotive Engineers*, November 25, 1999 (M.G. Picher, Ont.), pages 9–10)

[77] VIA's reaction to Arbitrator Picher's award is described at paragraphs 32–36 of Decision 230. It also details related proceedings thereafter at paragraphs 37–39. It said in part:

> [34] On the very day this award was issued, VIA ordered the conductors entitled to return to CN to report to the CN operations center within 72 hours, failing which, they risked forfeiting their chance to exercise their seniority with CN. The conductors were also told that VIA would be permanently cutting off salary protection by signing out of the letter of protection concluded as part of the CCAA.
>
> [35] Within 72 hours, the conductors appeared on CN's doorstep. (Incidentally, for the three and a half years that the conductors have been at CN, they have received salary protection as a result of a private agreement between the UTU, now the conductors' bargaining agent at CN until court matters are resolved.)

[78] This led to the specific events described below in respect to Mr. Paul Swim.

[79] Arbitrator Picher's award was challenged on judicial review in the Quebec Superior Court and quashed by Tingley J (see *Canadian National Railway Company (CN)* v. *Picher*, 2001 CanLII 15678

(QC C.S.)). The Court decision was critical of VIA's whole approach to NEPO and to the role the arbitration decision played in facilitating NEPO by allowing VIA to off-load the conductors to CN under the 1987 transfer agreement rather than dealing with the consequences of the downsizing itself. However, after the judgment was issued, the parties involved (CN, VIA and the BLE) sought to negotiate a broad resolution to the outstanding issues. This initially took the form of the Memorandum of Agreement, reproduced in full in Decision 230 at paragraphs 46–47. The fate of the judicial review decision is particularly addressed under paragraphs 20 and 21 of that agreement. However, the CIRB found that agreement defective, in terms of its remedial perspective, saying:

> (b) The Proposed MOU
>
> [107] The Board notes with some dismay that the proposed MOU does not modify the seniority ranking, contrary to the Board's order to reopen this aspect of the CCAA. The MOU merely provides for a sharing of employment losses, should there be cut backs due to layoffs, recalls, material changes (equivalent to technological change in other industries). The proposed MOU presumes that conductors will automatically go to the bottom of the seniority list at the end of their training. ...
>
> ...
>
> [112] The other difficulty that arises under the proposed MOU is that the conductors who become qualified locomotive engineers will remain at the bottom of the seniority list for the rest of their career. This situation arises because when CN locomotive engineers exercise their transfer rights to VIA, the seniority conditions of the Transfer Agreement (June 1985 or previous) that allows them to transfer will always give them a seniority advantage over the newly trained conductors. The CCAA establishes the seniority date of conductors who become qualified locomotive [*sic*] as a universal October 31, 1997. Thus, conductors' seniority will only ever exceed future VIA direct hires, a situation that is not in the foreseeable future.
>
> ...
>
> [114] The proposed MOU does little more than maintain in perpetuity a distinction between locomotive engineers employed by VIA prior to the NEPO initiative and marginalize the status of conductors who have become or will become qualified after implementation of the NEPO initiative (see in particular the sections of the MOU above, which have been emphasized). This distinction maintains the very distinction the Board found to be a breach of section 37, in *George Cairns et al (35), supra*: ...
>
> ...
>
> [116] Consequently, the Board finds that the proposals suggested by both parties do not go far enough in integrating the seniority of the merged classifications. ...

[80] Despite the CIRB's disparaging the proposed CN-VIA-BLE Memorandum of Settlement, those parties still crafted a further arrangement between themselves to reverse the effects of the Court order that quashed Arbitrator Picher's award interpreting the 1987 agreement in VIA Rail's favour. The Cairns Group characterizes this as a "private deal" to which neither they nor the CIRB were a party.

What happened is that Justice Tingley's decision was initially appealed by both VIA and the BLE. The parties agreed that the appellants would desist from those appeals and that CN would renounce all its rights under Tingley J.'s decision. This vacated the legal effect of the decision and left Arbitrator Picher's award intact.

[81] The Cairns Group relies upon Tingley J.'s criticism of VIA. VIA objects that this ruling was appealed and then set aside by consent. The Board is able to formulate its own views on the parties' positions in this matter and on the matters dealt with in the Picher award and it does not rely upon any findings or criticisms in the ruling of Tingley J.

G–Efforts to Renegotiate, Mediate or Arbitrate the CCAA

[82] The decision to settle the CN-VIA Rail dispute addressed, in the main, one of the three issues in the Board's remedial order. It had held the BLE had been reckless or negligent in not ensuring the recall rights to CN, which the BLE and VIA had relied upon, were indeed available. The VIA-CN-BLE agreement, and the implementation of the Picher arbitration decision to that dispute, brought certainty to those rights and VIA had compensated employees for their loss of income in the interim. The significance of this step is that little or no pecuniary damage to the Cairns Group flowed from this aspect of the breach, and those with recall rights to CN were given income protection from the time they were laid off until November 25, 1999.

[83] What happened thereafter to try to renegotiate the CCAA is sufficiently summarized in the following section from the subsequent Federal Court of Appeal decision:

> [18] The parties attempted to negotiate an agreement on the three disputed items in the CCAA identified in *Decision 35*: the process for selecting conductors to become locomotive engineers; the seniority provisions for conductors who became locomotive engineers; and the application of the agreement concerning employees' transfer rights between VIA and CN.
>
> [19] No agreement was reached, however, and the parties returned to the Board, which ordered a facilitation process with a Board employee and, if that failed, a mediation-arbitration process. With the parties' consent, the Board appointed Mr. Michel Picher, a widely respected arbitrator of great experience in the rail transportation industry, to undertake the mediation-arbitration and directed him to issue an award on the disputed items in the CCAA no later than October 31, 2001.
>
> [20] On October 22, 2001, the mediator-arbitrator asked the Board to extend the time for completing his work because encouraging progress was being made. In view of Mr. Picher's confidence that the prospects

> of a settlement would be enhanced by an extension, and in the absence of an objection from the parties, the Board granted an extension until January 31, 2002. However, on January 15, 2002, Mr. Picher requested another extension, this time until May 31, 2002. After consulting the parties and interveners, the Board granted an extension, but only to February 11, 2002, in order to enable scheduled mediation sessions to be held.
>
> [21] The mediation-arbitration process did not resolve the outstanding issues and, on February 11, 2002, the Board decided not to extend Mr. Picher's mandate, since it was not satisfied that adequate progress was being made or that further delay would assist the conductors. The Board pointed out that, in the two and a half years since it issued *Decision 35*, not one of the items in its order had been implemented, including the BLE's obligation to pay the conductors' solicitor-client legal fees incurred as a result of their participation in the mediation. VIA and the BLE opposed the Board's decision not to extend Mr. Picher's mandate, while the conductors opposed the request for an extension.
>
> [22] The Board decided not to grant a further extension to Mr. Picher and set dates for a hearing on two issues. ...
>
> (*Via Rail Canada Inc.* v. *Cairns*, 2004 FCA 194; [2005] 1 F.C.R. 205)

[84] Significantly, the Board's refusal to grant the extension had the effect of vacating the direction that Arbitrator Picher arbitrate the remaining dispute should mediation efforts fail.

[85] Paragraphs 28–30 of Decision 230 detail certain other steps in the proceedings. The first issue involved the Cairns Group expenses for the mediation and arbitration process. The second issue was the "much more difficult and important" issue of the appropriate remedies for implementing the rest of the order in Decision 35. That became the main subject of Decision 230.

H–Decision 230

[86] Decision 35 had reopened the negotiations over the CCAA, hoping to replace it with one more sensitive to the needs of the minority group of conductors. Efforts to precipitate such a renegotiation, and the necessary rebalancing of interests between VIA, the locomotive engineers in the unit, the conductors in the unit, the senior locomotive engineers in the BLE unit at CN, the BLE itself and, indirectly at least, CN, had failed. It was by then almost five years after the new CCAA agreement was to commence. The relative seniority of all the employees involved, whether locomotive engineers or conductors, had continued to change over time as, in the ordinary course of activity, employees bid on other locations, quit, retired or died. CN engineers continued to exercise their seniority rights to bid on jobs at VIA. For each such event, another employee moved up the seniority

ladder filling positions that thus became vacant, except where the employee came from CN, in which case the wait for an opening, for existing VIA employees, became longer.

[87] There comes a point in such matters where things get so tangled up that they became impossible to unravel. The position the Board faced, at the point of Decision 230, was close to that. The Board introduced its remedial approach as follows:

> **VI–Balancing the Remedial Issues**
>
> [74] In the reasons that follow, the Board's analysis and conclusions have been conducted from two different viewpoints, in order to balance the application of the principles incident upon remedial orders as reviewed in this part. The first viewpoint is to be found in Part IV, where the Board has considered the various aspects of a make-whole order, that is, the remedies that would be required to put the conductors in the position they would have enjoyed had the discriminatory acts of the BLE not occurred.
>
> [75] As a second viewpoint, the Board then considered the practical aspect of implementing these remedies, taking into account the passage of time. On the grounds indicated in Part V, the Board finds that it is not practicable to order the full implementation of the remedies, to which the conductors are rightfully entitled, but that a more nuanced approach should be adopted.
>
> [76] The outcome of this approach is that the considerations in fashioning a remedy have been analyzed first, followed by the remedial order, which takes into the considerations of the first analysis. Consequently, the enforceable remedial order is in part a monetary compensation for that part of the conductor workforce, which should have had access to employment at VIA since July 1, 1998, and in part a direction to VIA concerning the integration of the remaining conductors into VIA's workforce. In making submissions as to the amount of monetary compensation, the parties are to take into account the monetary value of the standards contemplated by the Board in its first analysis. Finally the issue of apportioning the cost of the Board's remedial order is addressed.
>
> (emphasis added)

[88] Between paragraphs 77–138 of Decision 230, Vice-Chairperson Pineau outlines the elements that might otherwise have been expected to go into a "make-whole order." Part V of the reasons explain five practical difficulties of granting a full make-whole order, at paragraphs 139–140:

> **X–Remedies in the Final Instance**
>
> [139] The above analysis does not leave any doubt that to provide full redress to the conductors, the Board's conclusions are far reaching. This does not mean that its conclusions should be modified because of this factor, but that the Board must now consider how such redress can be effectively discharged, given the passage of time and the nature of the employer's business. The first consideration is that some five years have passed since the CCAA was implemented and the majority of conductors are no longer at VIA. The second consideration is that this is an older workforce, where five years is a significant period of time with respect to retirement prospects. What might have been a favourable opportunity for training and employment as a locomotive engineers in 1998, is notably less appealing in 2003, with prospects for

employment likely to be in 2004. The third consideration is that to apply full redress will disrupt VIA's entire passenger service across Canada, with unpredictable effects on the travelling public. For conductors' opportunities for employment at VIA to remain open, VIA must be able to maintain customer confidence. The reorganization of crew consists across the country is not conducive to achieving this objective. The fourth consideration is that the Board's conclusions also have an effect on CN locomotive engineers who have since transferred to VIA since July 1, 1998. Their bulk return to CN as a result of the instant decision could potentially have the same ripple effect, though to a lesser degree, as the return of the conductors to CN following the 1999 arbitral award. The fifth consideration is that it is unlikely that all complainants would have had access to vacant locomotive engineer positions on and after July 1, 1998. Therefore, all remedies cannot equally apply to all conductors.

[140] Therefore, the Board has decided on an alternate form of compensation. The objective of the compensation is to provide a monetary settlement in lieu of full redress and to create opportunities for employment for those conductors who maintain an interest in working at VIA.

[89] Paragraph 141 set up an elaborate process to meet these expressed objectives. It provided:

[141] ...

(i) VIA is to create a document identifying all locomotive engineer vacancies at VIA on and since July 1, 1998, to the date of this decision. This document is to be remitted to the BLE and the conductors' representative, no later than June 15, 2003.

(ii) Conductors and the BLE shall have until July 15, 2003, to review the list and address any necessary corrections with VIA.

(iii) Conductors shall have until June 15, 2003, to request in writing from VIA a statement of the financial and benefit consequences of opting out of retirement or severance.

(iv) VIA shall have until July 15, 2003, to respond to individual conductors' requests for financial and benefit consequences information.

(v) All conductors who chose to do so shall be allowed to take the Bennett Mechanical Test. The passing mark is set at 60%. Are excluded from being taking the test conductors who elected to retire as a first option under the CCAA and who subsequently retired at VIA.

(vi) Conductors who are not working as qualified locomotive engineers and who are on current priority lists are not required to repeat the test (even if their passing mark was below 60%) and are to be included on the eligibility list set out below.

(vii) A national committee shall be created to set the correction standards for the Bennett Mechanical Test and interview all the conductors who elect to take the test.

(viii) The national committee shall be composed of an employer representative, a locomotive engineer representative designated by the BLE and a now trained locomotive engineer from the conductor ranks, all having an equal voice in the selection process. The national committee shall complete its evaluation and ranking of conductors no later than August 29, 2003. The decision of the national committee shall be final, except for obvious errors in the administration and marking of tests.

(ix) Conductors who pass the test shall be ranked in seniority order, hereinafter called the eligibility list.

(x) A number of conductors from the eligibility list, equivalent to the number of vacancies on or created since July 1, 1998, shall be entitled to receive monetary compensation in lieu of the redress as provided in the Board's conclusions. This number shall be calculated to include conductors who have become

qualified locomotive engineers and are working at VIA. Conductors who were not able to qualify or apply for locomotive engineer training because of a medical disability shall be entitled to compensation without the need to fill a vacancy.

(xi) Conductors remaining on the eligibility list who are not entitled to receive compensation in lieu of redress, shall be entitled to receive training to become a qualified locomotive engineer as locomotive engineer positions become vacant or are created across Canada, until there are no conductors remaining on that list. Upon becoming qualified locomotive engineers, a conductor's seniority shall be dovetailed within the terminal or seniority district, as the case may be, where employment is accepted. Conductors shall be entitled to expenses and wages during the training period and a relocation benefit equal to corporate policy if they accept to relocate.

(xii) Conductors who have become qualified locomotive engineers since July 1, 1998, and are working as locomotive engineers at VIA shall have their seniority dovetailed, by terminal or seniority district, as the case may be, where they are presently employed. They shall be entitled to retroactive compensation covering any loss of earnings and benefits resulting from their inferior seniority rank as if they had been trained and qualified on the date the first former conductor successfully completed the locomotive engineer training program.

(xiii) Conductors who qualify for monetary compensation under the terms of this decision shall have until September 30, 2003, to make written submissions to the Board on the amount of their claim. The BLE and VIA shall have until October 31, 2003 to respond to the conductors' submissions for compensation. Conductors shall have until November 14, 2003 to reply.

(xiv) The Board shall thereafter determine the amount of compensation owed under each claim, which may be decided with or without a hearing, at its discretion.

(xv) The Board shall further determine as between the BLE and VIA, the apportionment of financial responsibility for the monetary compensation being ordered within. Written representations on the apportionment of financial responsibility shall be submitted by the BLE, no later than September 30, 2003, with a response from VIA, no later than October 31, 2003. The BLE shall have until November 15, 2003 to reply. The Board may, at its discretion, decide this issue without holding oral hearings.

(xvi) Conductors are to be paid their legal fees and expenses on a solicitor-client basis with regard to the hearing on the remedies and the implementation of remedial orders within, if necessary, with interest calculated on the Snively/Hallowell method as of the thirtieth day following the date on which the account is received by the BLE's solicitor.

(xvii) Conductors are to be paid their expenses and wages with regard to the hearing on the remedies and the subsequent remedial orders, no later than June 30, 2003.

[90] Decision 230 closed with a reservation of jurisdiction over "any questions arising from this decision and the ensuing orders."

[91] At paragraphs 63–73, the Board addressed VIA's responsibility, noting that "VIA took on a unprecedented active role in all the hearings" once Decision 35 was issued. It concluded at paragraphs 71–72:

[71] In the within matter, VIA negotiated and agreed to a selection process, which affected training opportunities and the end tailing of the conductors' seniority. It also accepted the conditions under which

> the BLE Transfer Agreement was to be temporarily suspended. Its agreement on these issues contributed in setting up the discriminatory practices against the conductors. To quote *Central Okanagan School District No. 23* v. *Renaud*, *supra*, it "cannot [now] behave as if it were a bystander asserting that the [union's] plight is strictly a matter or the [union] to solve."
>
> [72] While the BLE bears the responsibility towards its membership for the breach to the *Code*, both the BLE and VIA must share in the consequences of the Board's decision since both parties were instrumental in producing the effects of the CCAA, though perhaps not to the same degree. In the circumstances of this case, the imposition of financial consequences on VIA is a necessary conclusion to give effect to the Board's orders where the object is to resolve the discriminatory effects of the CCAA.
>
> (Decision 230)

[92] This was the subject of review and comment in the Federal Court of Appeal, as addressed below.

[93] In the course of Decision 230, the Board addressed and rejected certain jurisdictional arguments raised by the BLE and VIA. These were also addressed by the Federal Court of Appeal (see below).

[94] Some further consideration of Decision 230 will be necessary below, but first it is useful to review what happened after that decision was issued. Perhaps inevitably, given the complexity of the remedy and the issues, the litigation that had gone before, and VIA Rail's ongoing objection that the Board was acting beyond its jurisdiction, more litigation ensued.

I–Second Federal Court of Appeal Decision

[95] Decision 230 was taken to judicial review before the Federal Court of Appeal. In a two to one decision, the Court upheld the Board's ruling, again using the patent unreasonability standard, and again using the remedial limits expressed in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*, as its benchmark.

[96] Unlike the remedy in Decision 35, Decision 230 imposed remedial terms in place of what the parties had or might have subsequently agreed. VIA and the BLE alleged that, by doing so, the Board exceeded its jurisdiction. As the Court described their complaint:

> [3] ... They assert that the order violates a fundamental principle of labour relations in Canada, namely the right of a union and an employer to settle the terms and conditions of employment through free

collective bargaining.

[4] The applicants say that the duty of fair representation is procedural in nature and does not mandate any particular outcome to negotiations between a union and an employer. They argue that, if the Board was not satisfied that VIA and the BLE had effectively remedied the union's breach of the duty of fair representation, it should have required them to continue with the mediation-arbitration process ordered by the Board to which they and the conductors had agreed.

(*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[97] At paragraphs 25–30, the Court summarized the four key CIRB findings in Decision 230 reviewed above. It rejected the argument that the Board committed a jurisdictional error by exceeding its remedial power, which might have justified a correctness standard of review.

[98] VIA argued before the Court that the CIRB had become *functus officio* following Decision 35, notwithstanding its expressed reservation of jurisdiction. The Court ruled at paragraph 69:

[69] In my opinion, the Board's express reservation of jurisdiction, exercisable if the parties could not resolve the outstanding remedial issues, authorized the Board to implement the order that it had granted in Decision 35, and to make any consequential amendments. ...

(*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[99] VIA's second objection was described at paragraph 75:

[75] Counsel for VIA stressed that the only breach of the *Code* that *Decision 35* was designed to remedy occurred in the period leading up to the CCAA. Accordingly, the Board exceeded its jurisdiction when, in framing the remedial order in *Decision 230*, it took into account events that had occurred after the date of the BLE's breach of the *Code*.

(*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[100] VIA still advances vestiges of that argument. It is an argument the Court rejected, in the following terms:

[76] I do not agree. In the "dynamic, complex and sensitive field" of labour relations (*Royal Oak Mines*, at para. 57), labour relations boards must be able to take account of changing circumstances if they are to discharge their statutory mandate with respect to "the constructive resolution of labour disputes for the benefit of the parties and the public" (*Ibid*, at para 56). Thus, referring to the wide powers conferred on the Board by subsection 99(2), Cory J. said in *Royal Oak Mines* (at para. 55):

> "In my view, this was done to give the Board the flexibility necessary to address the ever changing circumstances that present themselves in the wide variety of disputes which come before it in the sensitive field of labour relations."
>
> [77] To confine the Board's ability to craft a remedy by reference to the facts as they were when the breach was committed would encourage the filing of multiple complaints covering different periods of time. To put the Board into this kind of a straitjacket would thwart Parliament's purpose in granting broad and flexible remedial powers to the Board, namely, to enable it to bring about the constructive resolution of industrial disputes in fluid labour relations situations.
>
> (*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[101] This rationale treats the Board's remedial power as dynamic, a principle that still applies. Turning from the jurisdictional challenges to a review of the merits, the Court recognized that generally orders designed to rectify this type of failure involve sending the parties back to the bargaining table with directions. However, it went on to hold that the limited exception to this approach defined in *Royal Oak Mines Inc.*v. *Canada (Labour Relations Board)*, *supra*, might apply in this case as well:

> [83] If, as was held in *Royal Oak Mines*, subsection 99(2) is sufficiently broad to enable the Board to impose terms to remedy a breach of the duty to bargain in good faith, it was not, in my opinion, patently unreasonable for the Board to have concluded that subsection 99(2) also empowers it to impose terms to remedy a breach of the duty of fair representation, which, in this context, also focuses upon process. Restricting collective bargaining in this way, in order to end a labour dispute, does not necessarily contradict the objects and purposes of the *Code*.
>
> (*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[102] That said, the Court went on to address two more specific objections to the Board having effectively imposed collective agreement terms. The first was that VIA was never found to be in breach of the *Code* and the second was that section 99(1)(*b.1*) defines specific circumstances for such an order and thus precludes an order in this case. The Court rejected the view that section 99(1)(*b.1*) was intended to restrict the broad "equitable" remedial power included in section 99(2). As to VIA being held liable, the Court said:

> [86] In my opinion, however, while this consideration may limit the circumstances in which terms may be imposed to remedy a breach of the duty of fair representation, it does not make it patently unreasonable for the Board to have concluded that, in some situations at least, it can impose terms that bind an employer, even though the complaint did not name the employer as a party to the breach of the *Code*.

[87] ... The question is thus not whether a remedy can *ever* be awarded against a party that is not in breach of the *Code*, but whether the imposition of terms on VIA is justifiable under subsection 99(2).

[88] Second, the Board only imposed terms after the parties had failed to implement the remedy ordered in *Decision 35*, as amended. The Board's order that VIA and the BLE renegotiate the CCAA not only imposed process duties on VIA, but also potentially subjected it to less favourable terms than it would otherwise have negotiated had it not been for the union's breach of the *Code*.

[89] Third, the statutory provisions conferring the Board's remedial powers are sufficiently broad to support the grant of a remedy against VIA. True, the *Code* only permits the Board to award an "equitable" remedy under subsection 99(2) when it has found that a contravention of the *Code* has occurred. However, in the present case, a contravention of the *Code* had occurred: the BLE's breach of the duty to fairly represent the conductors.

[90] In my opinion, it was not patently unreasonable for the Board to conclude that the power to make a remedial order under subsection 99(2) "in respect of any contravention of or failure to comply with any provision" of the *Code* enumerated in subsection [page 242] 99(1), permitted it to include VIA in its remedial order. The Board had found that VIA was implicated in the breach, had participated actively in all the proceedings spawned by the conductors' initial complaint to the Board of the BLE's breach of the duty of fair representation, and had not complied with *Decision 35*.

(*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*, emphasis added)

[103] This finding remains very significant because VIA still protests that it was the BLE alone that was found to have breached its duties under the *Code* as alleged in the Cairns Group complaint. Particularly significant to the remedial question is the Court's recognition that the Board's remedies may be justified, not only because of the initial breach, but also by a subsequent failure to comply with the Board's original decision. The Court elaborated on this more fully as it considered VIA's further argument.

[95] ... that, since *Decision 230* was intended to remedy a breach of the *Code* committed by the BLE, there was no connection between the imposition of terms on VIA and the breach.

(*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[104] Of this, the Court ruled:

[96] I do not agree. Counsel's attempt to portray VIA as an innocent bystander caught up in an *intra* and *inter* union conflict is far removed from reality. The evidence indicates that, from soon after issuing the NEPO, VIA engaged in a course of conduct with respect to the conductors that was censured by the Board.

[97] Thus, after VIA originated the move to abolish the position of conductor as a cost-cutting measure and applied for the merger of the bargaining units, but before it negotiated the CCAA with the BLE, VIA was found to have breached paragraph 50(*b*) of the *Code* by attempting unilaterally to abolish the position

of conductor: see *VIA Rail Canada Inc.* (1998), 107 di 92; 25 CLRBR (2d) 150. The Board subsequently found that VIA and the BLE had engaged in "improper collaboration", and had breached the *Code*, in negotiating the CCAA: *Decision 35*, at para. 126. Finally, the Board found that, contrary to *Decision 35*, VIA had concluded the MOU with the BLE without any input from the conductors, the UTU, or the professional person appointed pursuant to *Decision 35* to assist the conductors.

[98] Consequently, I cannot agree that *Decision 230* is patently unreasonable because there was no rational relationship between the imposition of terms on VIA and the BLE's breach of the *Code*. ...

(*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[105] Later, the Court considered whether the decision to order compensation, particularly against VIA, was punitive or unreasonable. The Court outlined VIA's objections at paragraphs 136–144, saying in part:

[136] VIA says that the Board's order is punitive in nature and thus patently unreasonable by virtue of *Royal Oak Mines*. Counsel argues that, since the Board had not found VIA to be in breach of the *Code*, it was punitive to make an order against it. Although this argument was made with respect to the order as a whole in *Decision 230*, it seems particularly apt as regards the provision making VIA jointly and severally liable with the BLE for the payment of compensation to some conductors. In civil litigation, a court can only order the payment of damages by a party whom it has found liable of unlawful conduct.

...

[141] In my view, the compensation award in *Decision 230* is not patently unreasonable. The analogy with civil litigation is misplaced. It is a necessary consequence of the Board's order in *Decision 35* that the contract between VIA and the BLE would have to be renegotiated, with the possibility that VIA's obligations would thereby be increased.

[142] When the contract was not renegotiated in compliance with *Decision 35*, I cannot regard the Board's imposition of liability on VIA as punitive. Nothing in *Decision 230* suggests that financial obligations were imposed on VIA as "punishment". The order required VIA to shoulder the costs to conductors of retraining them to be locomotive engineers, as well as the cost of the training itself, and to share with the BLE some of the adverse financial consequences sustained by conductors as a result of the CCAA and the parties' failure to implement *Decision 35*. In the absence of reliable evidence about the amount that VIA was potentially liable to pay, it cannot be said that the Board's order was punitive rather than compensatory.

...

[144] It is equally clear that there is a rational relationship between the compensation ordered by the Board, and the union's breach of the duty of fair representation and its consequences. Conductors were being compensated for losses that they had suffered by virtue of the CCAA and the parties' failure to implement the Board's order in *Decision 35*.

(*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[106] Thus, the remedy is justified not only by the initial breach but also by the parties' (i.e. the BLE and VIA's) failure to implement the Board's remedial order in Decision 35. The damages, and thus the parties' responsibility for those damages, can flow from the initial breach and from the failure to do what the Board required the parties to do to stop the ongoing harm flowing from the initial breach.

[107] One further point is significant from the Court of Appeal decision, and is sufficient to dispose of one of the Cairns Group's repeated arguments. They say that VIA saved, and implicitly that the conductors lost, $15 million dollars a year. As the Court noted:

> [140] VIA had estimated that the workforce reductions announced in the NEPO would save it approximately $15 million a year. However, it was always clear that this was not a net saving. ...
>
> (*VIA Rail Canada Inc.* v. *Cairns (2004)*, *supra*)

[108] Further, VIA was "saving" money it did not have. The practical reality for VIA was that it was forced to make cuts somehow. Had it not done so through NEPO, it is a reasonable assumption that other cost saving measures would have been taken. The argument that VIA was precluded from seeking to cut costs, or that to the extent it did it so, it created an equal and opposite right to compensation for the affected employees, is unpersuasive.

[109] These points have now all been decided by the Board and upheld quite specifically by the Federal Court of Appeal.

J–Decisions over the Qualification Process

[110] After Decision 230 was upheld, steps were taken to implement the selection process directed by the Board. Disputes arose over this process and the matter returned to the Board once again. In *George Cairns*, 2006 CIRB 372 (Decision 372), Vice-Chairperson Pineau reviewed the eligibility aspect of the case and its link to compensation as follows:

> [5] As part of the reasoning leading to the award of extensive remedies, the Board held that the conductors who wished to be trained as locomotive engineers after the implementation of the CCAA had been improperly denied training opportunities. However, because of the significant disruption to VIA's operations (with consequences on the travelling public) that would be created by ordering VIA to train all the conductors and to return the more junior locomotive engineers to CN, the Board ordered compensation in lieu of the missed training opportunities. To qualify for compensation, conductors must meet the requirements of an eligibility list, by measuring up to qualifying tests that would be normally administered to persons seeking to become locomotive engineers. Once on the eligibility list, conductors are to be matched up to vacancies created at VIA since July 1, 1998, until the list of vacancies is exhausted. Conductors on the eligibility list that match up to the vacancies become entitled to compensation as per the terms of the Board's remedial orders. The original order also provided that conductors remaining on the eligibility list after the vacancy list was exhausted would be trained and hired as locomotive engineers at VIA ahead of CN locomotive engineers until all conductors are trained and hired. This provision of the order has become moot because the number of vacancies created at VIA since July 1, 1998 (123), exceeds the number of conductors who are actually seeking to qualify for the eligibility list (104). In the end, all conductors who meet the eligibility requirements, including those who were already eligible for training and were not required to be tested (7), will be matched up to a vacancy and be eligible for compensation. Those who do not make the eligibility list will lose any chance at receiving compensation.
>
> (emphasis added)

[111] The Board set the rules for the eligibility testing; it was to be administered by a national committee and consist of the Bennett Mechanical Comprehension Test followed by an oral interview. The Bennett Test was conducted in the Spring of 2006. The interviews were carried out between September 11 and November 6, 2006. Following the assessment of the interviews by the national committee, 39 candidates passed, two refused to participate, and 63 failed (see *George Cairns*, 2007 CIRB 390 (Decision 390), at paragraph 5). Once the process was over, the Cairns Group complained that the oral interviews were unduly harsh and sought to have the results set aside or varied.

[112] Vice-Chairperson Pineau subdivided the claimants as follows:

> [21] Group 1 comprises (i) former VIA conductors who have passed the interview, are ready to be ranked in seniority order and form part of the eligibility list; (ii) former VIA conductors who were already eligible for training and were not required to be tested; and (iii) former VIA conductors who are considered medically restricted. ...
>
> [22] Group 2 comprises all VIA conductors who passed the Bennett Test but failed the fall 2006 interviews. ...
>
> (Decision 372)

[113] A hearing process was established to consider the allegation that Group II ought to be reassessed, or declared eligible, due to flaws in the evaluation process. VIA Rail sought to have this decision reconsidered, and the issue went before a three person panel of the Board (see

Decision 390). That panel set aside that aspect of Decision 372 that would have reassessed the validity of the testing process. The reconsideration panel ruled that the original panel, having reserved only limited jurisdiction to deal with obvious errors in the administration or marking of the tests, would exceed that limited reservation of jurisdiction to embark on the Group II review as originally proposed.

[114] This left the compensation process contemplated in respect of Group 1 to proceed, the processes for which had been set out at paragraph 21 of Decision 372. This left a group of only 39 conductors who succeeded in the qualification process and were thus entitled to compensation, (plus the two other subgroups in Group 1). Arguably, this diminished considerably the prospect that any in-kind remedy would unduly disrupt either VIA or CN's operations, since the group that ultimately proved qualified was much smaller than originally contemplated. It has led the Cairns Group to argue, once again, that certain of its members should now be considered for employment as engineers at VIA Rail.

K–Dovetailing Seniority Lists

[115] The remedies in Decision 230 involved (in part) the compiling and integrating or "dovetailing" the Cairns Group employees into a locomotive engineer's seniority list. Without getting into too much detail at this point, certain disputes arose during this process and directions were given for their resolution. For a brief review, see Decision 381 at paragraph 13 et seq.

[116] The most important aspect, for matters still outstanding, involves the decision as to just what form of seniority the Board expected the parties to use for the purposes of dovetailing. Vice-Chairperson Pineau described the issues in *George Cairns*, 2005 CIRB LD 1225 (LD 1225):

> The crux of the implementation process rests on creating a dovetailed seniority list of locomotive engineers comprising the former conductors affected by *George Cairns et al*, *supra* and the VIA's other locomotive engineers. To this end, the Board favoured and the parties have agreed that an accord rather than a Board decision be the basis for establishing this seniority list. The meetings have proceeded on this basis.
>
> For clarity, the reference date for seniority ranking was stated in the Board's decision as the "trainman date." At the meeting held on February 18, VIA raised the issue of its interpretation of "trainman date" as used and described in the Board's decision as meaning that locomotive engineers should be ranked according to their service date with VIA. TCRC and the Cairns group took the position that "trainman

date" meant the expression as commonly understood in the rail industry, that is the date at which an employee became part of the running trades.

(page 3)

[117] The letter sets out VIA's further objection that it would not accede to any modification to the remedies ordered in Decision 230. VIA provided a seniority list based on each employee's full service date with VIA–essentially a date of hire calculation, not a list based on the individual's trainman seniority. LD 1225 held:

... what is at stake, is the Board's intended meaning of paragraph [123] of its decision when it said:

"[123] To give effect to the dovetailing of the seniority list, **the trainman date**, which represents the date of the beginning of employment service and used to calculate other benefits, is the most objective date by which to establish seniority ranking. This date, therefore, renders irrelevant the universal date of October 31, 1997 applied to all conductors who have since become qualified locomotive engineers. **The trainman date is to determine the seniority date of all locomotive engineers within the bargaining unit.**

(page 47; emphasis added)"

There may be some cause for inquiring what was intended by the expression "which represents the date of the beginning of employment service and used to calculate other benefits" as it applied to the expression "trainman date." However, a decision must be appreciated on the basis of its entire context, not on a single sentence excised so as to discredit a number of related ideas. ...

The essence of the disputed term "trainman date" relates to the concept of seniority and how it will be applied to construct a new seniority list for locomotive engineers as a result of the Board's remedial orders in *George Cairns et al., supra*. On this issue, the Board must agree with TCRC and the Cairns Group that seniority is a union concept as it is the bargaining agent and the bargaining unit members that determine the basis of seniority. Employers generally have little involvement in this determination other than complying with the collective agreement. Furthermore, seniority does not exist outside the confines of a collective agreement save "as a matter of grace" as aptly put by the late Chief Justice Bora Laskin. ...

It should also be remembered that in the instant matter, the implementation of the remedial provisions involve TCRC and the Cairns Group coming to some mutually satisfactory arrangement in order to dovetail the seniority list. To the extent that they agree on the meaning of the term "trainman date" and are able to apply it in resolving their differences, the Board is inclined not to interfere. TCRC's submissions that dovetailing the seniority lists eliminates the distinction between locomotive engineers prior to the NEPO initiative and conductors who qualify to be locomotive engineers after the implementation of the NEPO initiative accurately reflects the Board's intent.

...

Accordingly, the term "trainman date" must receive the clear and unambiguous meaning of this commonly used term in the railway industry, apparently well understood by the unions and applied by VIA to its running trades.

(pages 7–9)

[118] Different parties establish seniority in different ways. It is not uncommon for seniority to run from one's date of hire, date of obtaining a particular job, or date of arrival at a particular branch, or entry into a particular bargaining unit. Often, as here, different forms of seniority exist, and are used for different purposes, within a collective agreement.

[119] The Board's reasons acknowledge that "seniority" is not some absolute right or concept, but is defined by parties for their own workplace. Further, the choice of "trainman seniority" was an exercise of the Board's remedial judgment; it was the type of seniority felt appropriate for this case to remedy this breach.

[120] VIA sought reconsideration of this decision opting for trainman seniority, alleging it was an alteration of Decision 230, involved errors of law and policy and denied VIA Rail natural justice (see Decision 381 at paragraph 71 et seq. VIA argued that the Board had simply changed its mind, having failed to appreciate the distinction between an employee's trainman date and the date of entry into service.

[121] A reconsideration panel reviewed, but rejected, VIA's position. In its view, the original panel had simply clarified the original meaning of paragraph 123 of the decision and VIA was attempting to have the Board modify that meaning (see Decision 381 at paragraph 85). The reconsideration panel also rejected the natural justice arguments. It closed its reasons by urging the parties to make greater efforts to resolve the outstanding issues.

L–Further Reconsideration

[122] After the Court of Appeal Decision and the Supreme Court of Canada's refusal of leave to appeal over Decision 230; and *Via Rail Canada* v. *Cairns* [2005] 1 FCR 205, leave to appeal refused January 20, 2005, VIA once again asked the Board to use its reconsideration powers (a) to reconsider LD 1225 (see above) and (b) to reconsider Decision 35; *George Cairns et al.*, 2001 CIRB 111 (Decision 111); and Decision 230. The main reasons said to justify reconsidering the decisions over remedy related to a subsequent CIRB decision in *TELUS Communications Inc.*, 2005 CIRB 317, released on April 20, 2005. VIA pressed the argument that the CIRB had resiled from its earlier

ruling to impose collective agreement terms (directly or through arbitration) and that this "new approach" should be applied to the outstanding remedial orders in this case. VIA repeated its arguments protesting its being held liable on a duty of fair representation complaint. A number of other grounds of complaint, some new, some raised before, were also aired. The Board panel hearing those matters rejected all the requests for reconsideration for reasons set out in Decision 381, which have been considered once again, but do not need to be repeated here.

IV–PRINCIPLES OF COMPENSATION

A–Compensation as contemplated by Decision 230

[123] The net result is that, of all the Cairns Group claims, classified in Decision 372 as Group 1 or Group 2, only Group 1 claimants are now entitled to compensation. As described there, Group 1 includes three subgroups:

> [21] Group 1 comprises (i) former VIA conductors who have passed the interview, are ready to be ranked in seniority order and form part of the eligibility list; (ii) former VIA conductors who were already eligible for training and were not required to be tested; and (iii) former VIA conductors who are considered medically restricted. Those who are part of Group 1 are clearly eligible for compensation. For the reasons explained earlier, all conductors who meet the eligibility requirements will be matched up to a vacancy and be eligible for compensation. ...

[124] The parties disagree on what remedies this group is entitled to, taking widely different views on what Decision 230 intended.

[125] There is an eligibility list, as required by paragraph 141 (ix) of Decision 230. The number of vacancies on or created since July 1, 1998, exceeds the number of people on that eligibility list. As per paragraph 141 (x), all the eligible conductors:

> [141] ...
>
> (x) ... shall be entitled to receive monetary compensation in lieu of the redress as provided in the Board's conclusions ... Conductors who were not able to qualify or apply for locomotive engineer training because of a medical disability shall be entitled to compensation without the need to fill a vacancy.
>
> ...

(xiv) The Board shall thereafter determine the amount of compensation owed under each claim, ...

(Decision 230)

[126] Paragraph 141 (xiv) then provides (after the submission of written claims) that "[t]he Board shall thereafter determine the amount of compensation under each claim..." There are other indications in Decision 230 as to the Board's intentions about compensation:

[139] ... to provide full redress to the conductors, the Board's conclusions are far reaching. ...

[140] Therefore, the Board has decided on an alternate form of compensation. The objective of the compensation is to provide a monetary settlement in lieu of full redress...

[127] The reference to "an alternative form of compensation" suggests something different from Part IV; some other approach. However, this reference still has to be read in light of the earlier explanatory comments in paragraphs 74–76, set out in full above, which describe Parts IV and V as "two different view points." It is not quite clear what is meant by "a more nuanced approach" however, paragraph 76 is helpful. Leaving out the reference to non-Group 1 conductors, it provides:

[76] The outcome of this approach is that the considerations in fashioning a remedy have been analyzed first, followed by the remedial order, which takes into the considerations of the first analysis. Consequently, the enforceable remedial order is in part a monetary compensation for that part of the conductor workforce, which should have had access to employment at VIA since July 1, 1998... In making submissions as to the amount of monetary compensation, the parties are to take into account the monetary value of the standards contemplated by the Board in its first analysis. ...

(Decision 230; emphasis added)

[128] This last sentence makes it clear the alternative monetary remedy awarded in Part V is not totally divorced from the discussions in Part IV, since it contemplates compensation that reflects "the standards ... in the first analysis." Some additional comments from Decision 230, appearing before Part V, are therefore still pertinent to the remedial question.

[129] At paragraphs 50–76, the Board discussed "Principles Applicable to the Board's Remedial Orders." These include the *Royal Oak* test, discussed above, the significance of the Board's expertise in fashioning a remedy, and the breadth of section 99. At paragraph 56, the Board says:

> [56] The fifth principle comes from the civil law of damages, *restitutio in integrum*: the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligations to take reasonable steps to mitigate his or her losses (see *Foreman* v. *VIA Rail Canada Inc.* (1980), 1 C.H.R.R. D/233). See as well *Société Radio-Canada* v. *Association des réalisateurs*, *supra*:
>
> "[7] We do not agree. Relying on the comments of Cory J. in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, **the Board attempted to place the respondent in the position it would have been in had the breach not occurred** (see in particular *Royal Oak*, paragraph 90, cited by the Board in the conclusion of paragraph 79 of its reasons).
>
> [8] The applicant contends that the remedy does not bring about that result. The applicant must nonetheless establish how the remedy fashioned by the Board fails to achieve this result. **In this respect, it is useful to note that the remedy does not have to be perfect**. ...
>
> (page 4: emphasis added)"
>
> (Decision 230)

[130] At paragraph 58, the Board concludes that a Respondent's mental state is not relevant and is not a mitigating factor in terms of liability. At paragraphs 59–61, the Board outlined three additional factors it felt should be taken into account in a make-whole order.

> [59] In addition to the five principles set forth above, the Board also must consider, in the instant matter, the passage of time and, hence, the situation as it has evolved since the time of the original decision. Conductors who have not become qualified locomotive engineers are no longer employed at VIA. Some are employed at CN. Some have accepted severance arrangements. Some locomotive engineers who used to work at CN now work at VIA. Many of the conductors have retired, and so on. In other words, the considerations that went into the Board's orders in October 1999 have changed due to the passage of time, not the least of which is the growth of VIA's business and the emergence of CN as a reluctant player in this matter. The passage of time has also considerably raised the financial stakes, and is a likely explanation as to why the parties have been unable to come to terms with the reopening of the CCAA as ordered by the Board. The passage of time has not only raised the financial stakes but also taken its toll on the personal lives of the conductors.
>
> [60] It is the Board's view that the delays in achieving the results now being ordered are a direct consequence of the breach of section 37 of the *Code* by the BLE. To limit a make-whole order because of this factor would be to place the responsibility on the innocent parties, the conductors. Moreover, delays in litigation are not beyond the contemplation of parties to a dispute as to affect the amount of compensation and the period covered by an award.
>
> [61] Additionally, the Board is mindful of conductors' loss of employment dignity that followed the implementation of the CCAA, the inordinate employment uncertainty to which they have been subject for the past five years as well as the profound effects on their families.
>
> (Decision 230; emphasis added)

[131] At paragraph 124, the Board addresses the issue of how to compensate conductors who could and should have been trained as locomotive engineers, for the pay they may have lost due to absence

of that training and dovetailing. Recognizing the difficulty in calculating actual losses, the Board said:

> [124] To remedy their loss of earnings due to the breach of their seniority rights, the conductors should receive retroactive pay that reflects their training as a locomotive engineer as if they had been trained and qualified on the date the first former conductor successfully completed the locomotive engineer training program (deemed date of qualification). Given the passage of time, it is impractical, if not impossible to reconstruct schedules to calculate loss of earnings in accordance with this seniority date. It is the Board's judgement that the average rate of pay of locomotive engineers at the conductor's home terminal or seniority district, would be adequate compensation in this regard.
>
> (Decision 230; emphasis added)

[132] At paragraph 126, the Board addressed the situation of employees who returned to CN but had to change terminals. This is particularly relevant to Mr. Cairns' claim:

> [126] For those conductors involuntarily sent back to CN as a result of the arbitrator's decision, and who were required to change terminals at CN to maintain employment, but did not receive a relocation benefit which they would have received in the normal course, they should be compensated for this transfer by receiving a relocation allowance of $25,000.
>
> (Decision 230; emphasis added)

[133] This is a remedial observation. It does not say they are entitled to such an amount under the collective agreement, although the Board clearly used the collective agreement clause, by way of analogy, in setting appropriate compensation. Similarly, it said at paragraph 128:

> [128] There is no doubt that allowing country-wide transfers as may be directed here will be disruptive. The situation could have been minimized, had the BLE and VIA acted sooner. It is also equitable that such transfers be the subject of a relocation allowance as provided under corporate policy.
>
> (Decision 230)

[134] At paragraphs 134 and 135, the Board accepted two points still being advanced by the Cairns Group. That is that the work at VIA Rail is more desirable and that the pension benefits are better:

> [134] It should be noted here that the overnight return of the conductors to CN was not without its own difficulties. As most of the conductors had not worked at CN for a number of years, and because passenger duties and freight duties are considerably different, they could not be immediately returned to active duty at CN. Accordingly, some were retrained and resumed active duty over time, some have remained

> unemployed, some retired and others took severance packages from CN. As a result, the conductors' pensions have been negatively affected. The Board also takes into consideration, in ordering remedies, that jobs at VIA are considered the most enviable of the railway industry; contrary to freight operations, passenger work is scheduled and carried out on the basis of regular timetables, which are the staple of passenger service, and the work is less physically demanding. As well, VIA's pension plan is more advantageous than that of CN, which explains why the crucial pre-retirement years are in high demand at VIA by CN locomotive engineers having transfer rights.
>
> (Decision 230)

B–Compensation for Loss of Future Employment

[135] As noted at the outset, this decision involves five "test cases." Each raises unique issues. However, all five raise the basic issue of what Decision 230 intended when, in lieu of training and a return to service as engineers under a dovetailed seniority list, the Board ordered that those who qualified be "compensated."

[136] The parties disagree on virtually every element that might be thought to be included in a framework for compensation. They differ on the period of time such compensation should cover, on whether it contemplates a retiring allowance or some other form of non-taxable damage award, whether and to what extent mitigation applies, and whether an award should be all inclusive of the various matters complained of, or cumulative.

[137] There are a variety of models or frameworks used in law to determine how to quantify the value of the loss of a job. There is the concept of wrongful dismissal in the common law of employment, make-whole orders for unfair labour practices and human rights remedies, the awards arbitrators have given when they decline to reinstate for some reason, and awards in tort law when an employee loses the capacity to work.

C–Labour Board Remedies

[138] Two decisions of then Ontario Labour Relations Board Chair George Adams address some of the challenges in setting a remedial approach to Labour Board remedies:

[21] In *Canada Cement Lafarge Ltd., supra*, at paragraph 32 the Board noted that, while common law damage assessment principles provide helpful analogies, remedies had to draw their purpose from the *Labour Relations Act* and distinctive labour relations policy considerations. In this respect, the Board wrote:

"Earlier in this opinion we said that compensation awarded under section 89 and the other remedial provisions should draw its purpose from the *Labour Relations Act* and the particular substantive provisions in issue. Principles of damage assessment developed in contract and tort law may provide useful analogies but, in the final analysis, labour law principles must prevail. Legal concepts such as "reasonable foreseeability", "causation" or "remoteness" all tend to reflect the aims of either contract law or tort law. When studied carefully, they amount to formulae by which loss and risk are allocated in light of what contract and tort law are trying to accomplish. In essence, they amount to policy determinations in particular cases. Professor Swinton, in her very learned article, has observed:

'Fuller and Perdue, in their classic article "The Reliance Interest in Contract Damages", noted that it is just as important to decide where to stop in the enforcement of promises as it is to decide where to begin in that process. Should the defaulting promisor be required to compensate the promisee for all the losses caused by his failure to perform (leaving aside for the moment any debate over the flexibility of the concept of causation)? Or should he be protected to some degree from liability which could be a crushing burden out of all proportion to the benefit which he expected to receive under the contract?

Should the taxi driver who promises to deliver the business tycoon to his plane on time be liable for the loss of a lucrative deal because he gets tied up in a traffic jam? Should a manufacturer supplying substandard cloth to a company making shirts be liable for the loss of future orders from customers dissatisfied with the product?

Courts have had to make difficult decisions in assessing where to stop in the enforcement of contracts. They may purport to adhere to the general principle that the innocent party should be placed in the position in which he would have been had the contract been performed, yet invariably they invoke doctrines which place some limit on the defaulting party's liability; certainty, causation, mitigation, or foreseeability. The focus of this study is the last of these four doctrines, that of foreseeability.'

And dealing specifically with the doctrine of foreseeability, she writes:

'Even if the foreseeability rule is a justifiable one, its application in the courts has not always been satisfactory. This flows largely from the judicial failure to acknowledge that the "rule" is really little more than a statement of general principle. The decision to find certain types of losses foreseeable and not others is the result of a conscious policy decision to protect certain interests. Such decisions require elaboration and exploration, yet too frequently the application of the foreseeability rule is treated as an *exercise in* fact determination, and any efforts to elaborate reasons have focussed on an exegesis of the words in *Hadley v. Baxendale*. Judges and commentators have made valiant attempts to articulate the precise degree of foreseeability required in order that damages for breach of contract be compensable, yet the products of their efforts are frustrating in their abstraction. ...

The striking characteristic of all of these judicial efforts to deal with the foreseeability test is their lack of practical assistance in determining whether any particular loss was or was not foreseeable "on the facts of this case." One has only to refer to the extensive discussion of the rule of foreseeability in damages in Reid's judgement in the *Heron II* case followed by an extremely brief and conclusory application to the facts of the case for a striking example. A strictly legal or mechanistic analysis of the rule is inadequate to aid in the determination of the proper scope of liability in a given case. Judges are not undertaking a factual determination on the basis of the rule (or rules) described above. They are making important determinations as to who should bear a loss which has resulted from the breach of a contract. In doing so, they may be adapting the concept of foreseeability at times to meet changing circumstances.

> See Katherin Swinton, *Foreseeability: Where Should the Award of Contract Damages Cease?*, found in Reiter and Swan, Studies in Contract Law (1980).'
>
> Tort law's grappling over the years with economic loss is a classic illustration of how loss allocation principles are, in effect, policy determinations grounded in the purposes of a particular field of law. See Linden, *Canadian Tort Law* (1977), p. 367. Labour law can be no different. Indeed, damage cases have already begun to emphasize distinctive labour relations policy considerations."
>
> (*Consolidated Bathurst Packaging Ltd.*, [1994] OLRB Rep. January 422)

[139] Angela Swan, *Canadian Contract Law*, 2d ed., (Toronto: Lexis Nexis Canada, 2009) summarizes the contrast in objectives between tort and contract law.

> 6.188 If the choice in awarding compensation is seen as a question of protecting either the reliance interest or the expectation interest, that choice is between the tort measure and the contract measure. In tort, the object of compensation is to compensate the plaintiff for the harm done, i.e., to put the plaintiff in the position that it would have been in had the harmful act not occurred. In contract, on the other hand, the plaintiff is to be put in the position that it would have been in had the contract been performed. ...

[140] *Labour Code* unfair labour practices straddle these two objectives. They are designed like tort law to establish certain standards of conduct in the collective bargaining process, but to the end of establishing collective contracts of employment.

[141] Many of the issues that arise in labour board compensation remedies are usefully reviewed in David Wright, Jerry Raso, *Labour Relations Board Remedies in Canada*, 2d ed. (Aurora: Canada Law Book, 2008), particularly in Chapter 9–Compensation. As that commentary illustrates, one of the key differences is in the approach to mitigation where the employee is actively seeking reinstatement or some similar "in-kind" or "make-whole" order. In this case, the Cairns Group assert:

> This is not a case where the common-law principle of mitigation should be applied against any of the Complainants. The Complainants not only lost income but they lost some very real rights, privileges and future opportunities. This is not a case analogous to a claim of lost income. Rather, it is a case analogous to the loss of valuable rights. Accordingly, the principles of mitigation ought not to be applied against the Complainants. We refer the Vice Chair back to the decisions of Professor Simmons and Arbitrator Marcotte reviewed at length in our original submissions.

[142] The Simmons and Marcotte arbitration decisions are reviewed below.

[143] Tort law and contract law are different in a second respect when the damage relates to work. In many tort cases, the employee, as a result of the tort, loses the capacity to perform work. In

contract law, the loss of a particular job has no such effect, as described in *Asamera Oil Corporation Ltd.* v. *Sea Oil & General Corporation et al.*, [1979] 1 S.C.R. 633:

> ... Thus if an employer wrongfully dismisses an employee the breach results in the employee obtaining an asset, an ability to work for another employer, or at least the opportunity to offer his services to that end, which he did not enjoy prior to the dismissal. This is no more than a philosophical explanation of the simple test of fairness and reasonableness in establishing the presence and extent of the burden to mitigate in varying circumstances.
>
> This approach was adopted by Rand J. in *Karas et al* v. *Rowlett*, [1944] S.C.R. 1 at p. 8, where he said, in a case of fraud resulting in a loss of profits:
>
> "... by the default or wrong there is released a capacity to work or to earn. That capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach."
>
> (page 656)

[144] The impact of this is principally on the duty to mitigate. However, given broad labour board remedial powers, it is expected that, where possible, boards will seek to restore the person harmed to the position they would have been but for the breach, rather than limit their remedy to damages. There is a time, therefore, during which the wronged employee may reasonably expect reinstatement by Board order, and this has an impact on how mitigation efforts are viewed.

[145] Decision 230, after much effort had been spent encouraging the parties to negotiate terms that met their statutory obligations, imposed those terms by way of remedy. However, it then recognized that implementing that remedy by granting the equivalent of specific performance to the senior employees in question (once trained) would be too disruptive. The Board then decided on compensation as the only practical option.

[146] The Board's approach to mitigation was discussed in *Samuel John Snively* (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRB no. 527):

> It is the view of this Board that there is no duty to mitigate in the case of a dismissal of an employee pursuant to a complaint alleging a contravention of section 97(1)(*d*). Unquestionably the duty to mitigate was developed by the courts in the cases of breach of contract or wrongful dismissal because the remedial power of the courts on those occasions is that of putting the plaintiff in the same position as he would have been in, but for the breach of contract, in a monetary sense. The courts, in the case of wrongful dismissal, are not in the position to reinstate the wronged employee. All that can be done is to recompense that employee for the loss of wages and other benefits resulting from the loss of employment. In those circumstances, the employee is obviously aware that he cannot get his job back through the courts and is

> therefore under an obligation to seek alternate employment. Thus follows the duty to mitigate. The instant case is different in the very basic sense that what the complainant is seeking is reinstatement in the job from which he was dismissed and compensation for pay that would have been earned. The Board is not of the view that said employee has a duty to mitigate damages by seeking alternate employment where all reasonable steps are being taken to be reinstated in the job from which he was unlawfully dismissed.
>
> ...
>
> The second issue arising under the heading of mitigation is whether the Board should deduct, from any amount owing by the employer, the amount actually earned by Mr. Snively since his dismissal. The general principle in such matters is that a dismissed employee should not benefit from this dismissal; that is, that he should be put back in the same position he would have been but for his discharge. If the amount of Mr. Snively's earnings, that is $3,607.00, is not deducted from any amount owing by the employer, Mr. Snively will in fact have earned more as a result of his dismissal than he would have but for his dismissal. Accordingly, although there is no duty to mitigate where mitigation has taken place, said amount will be deducted and the amount of $3,607.00 earned by Mr. Snively will be deducted from what the Board orders as compensation.
>
> (pages 119–120; and 105–106)

[147] Reinstatement, and the right thereafter not to be terminated except for just cause, carries the perceived promise of a longtime opportunity to perform a job subject to the obligation not to give just cause for termination, and to the related wage flow. The stronger the particular industry and the seniority rights, the stronger this perceived promise. Indeed, if a pension is involved, the economic benefits could conceivably last a lifetime. The words "make whole" imply a right to calculate the economic value of the job in a limitless way, offsetting only actual or potential earnings in mitigation.

[148] Common law employment provides a limit based on two factors. First, the employer has the right to end the contract without cause and without fear of reinstatement, since specific performance is not available to employees. Second, the Courts have long held that the outer limit for reasonable notice is about two years. This places an outside cap on any common law damage award. In contrast, most collective agreements prevent unilateral termination without cause and provide for arbitration and, if successful, the promise of specific performance through reinstatement. The issue, without the common law's two year cap, but when the customary reinstatement is for some reason withheld, is how can any limit on employee compensation for actual or anticipated loss be explained. The reported arbitration and board awards tend to explain the basis of the awards that are given, but are less explicit in explaining why employee claims are denied. This is indicative of the lack of clear and accepted principal.

[149] These are not new issues. Professor Geoff England in his text *Employment Law in Canada*, 4th ed. (Toronto: Butterworths, 2005), and in certain of his other writings, characterizes this ambivalence between "make-whole" and "reasonable notice of change" as part of a broader philosophical difference. For example, he says in the introduction to Part III (fourth edition)—Termination of Employment:

> III.9 The common law and legislation governing employment termination must be evaluated in the context of the fundamental tension between the "rights" paradigm and the "efficiency" paradigm that pervades all of Canadian employment law. ...The law in this area is currently at a crossroads, with some courts and legislators favouring further expansions of employee "rights" and others favouring policies that would make it cheaper for employers to discard unwanted workers in the interest of maximizing "efficiency". Part 3 of this publication discusses where the point of balance between the two paradigms is currently located as far as legislative and common law developments are concerned, and suggests how it might be readjusted.

[150] The Cairns Group urges that what Vice-Chairperson Pineau intended by compensation was a make-whole order of the type described in Part IV of Decision 230, modified only to quantify the value of those specific performance aspects of the award it would be too disruptive and impractical to implement.

[151] The Board, the Cairns Group urges, has elsewhere adopted this broad make-whole approach to breaches of the duty of fair representation, illustrated by the CLRB decision in the *Eamor* cases (see *Brian L. Eamor* (1996), 101 di 76; 39 CLRBR (2d) 14; and 96 CLLC 220-039 (CLRB no. 1162); and *Brian L. Eamor* (1998), 107 di 103 (CLRB no. 1234) (Decision 1234).

[152] The claims specifically addressed in Eamor relate mostly to the costs of various proceedings, not to lost pay. The case was one involving serious findings of *mala fides* against the union and certain of its officers who, for personal reasons, had turned the employee in to his employer and then impeded his efforts during the grievance and arbitration process. The Board in that case referred to its broad discretion under section 99 to "make whole" a successful complainant (see paragraph 113 of the 1996 decision).

[153] In the Decision 1234, the Board, after referring to *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*, said:

> The purposes of the Board's remedy in the present case is to restore the complainant to the position he would have been, had no violation of the *Code* occurred; put another way, the compensation ordered should counteract, as much as possible, the consequences of the union's breach of the *Code*.
>
> The Supreme Court of Canada in *Gendron* v. *Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, commented on the Board's remedial powers designed to "make whole" a successful complainant.
>
> "The remedial provisions improve significantly the position at common law of an aggrieved person. At common law, courts were restricted to an award of damages, whereas under the *Canada Labour Code*, a broad range of remedies designed to 'make whole' are available. The range of remedies recognizes that often an award of damages will only go a short distance in remedying the effects of a breach. Parliament has substituted a broad, comprehensive, remedial scheme much superior to an award of damages available at common law. ..."
>
> (p. 1318)
>
> This "make whole" aspect was confirmed by the Court in *Royal Oak, supra*. ...
>
> (pages 5–6)

[154] The common law approach has had at least some influence on the approach of labour boards to quantifying longer term economic loss as a result of the loss of unionized employment. In *Jan Dezentje, Gordon Dombrosky, Denis Roy, William Warchow, General Presidents Maintenance Committee and Delta Catalytic Inc.* v. *Jim Bendfeld and IBEW Local 424*, [2005] Alta.L.R.B.R. 380 (Jan Dezentje et al.), this Vice-Chairperson, sitting as a Vice-Chairperson of the Alberta Labour Relations Board (ALRB), had to assess the loss of employment earnings of three employees who had succeeded in establishing a union's breach of the duty of fair representation in failing to advance their grievances to arbitration.

[155] The ALRB considered the common law approach to damages, and the contingencies and mitigation principles involved, even if terms of employment beyond the customary two year common law limit are considered. It said, at paragraphs 23–25:

> [23] Whether or not the principles in wrongful dismissal law are applicable directly, they are at least indirectly influential. One of the principle reasons for the high-end limit usually applied in such cases (and we do not need to enter the debate on the exact figure (if any) involved) is that it represents a reasonable period of time for the individual to find alternative employment. It thus provides an analogy to the question of mitigation. There comes a point after which one can presume that a dismissed employee will be able to find alternative employment.
>
> [24] This point also merges with a second principle long recognized in the law of damages. That is the need to take into account unexpected contingencies. While an employee may feel secure in their

> employment for life, and may feel themselves entitled to life time security of employment (as these employees virtually attested to) life throws up a series of contingencies that make basing a damage award on that assumption problematic. This factor too justifies a maximum quantum for damages for loss of employment.
>
> [25] The wrongful dismissal cases have not ignored the argument that employment is at times expected to last until retirement. That argument, for example, was put forward in the leading case on mitigation *Michaels v. Red Deer College* (*supra*). Many of the cases that involve awards at the high end of the scale do so on the basis of just such an expectation of employment until retirement, usually coupled with a restricted type of skill that makes reemployment difficult, a factor that does not apply to electricians in Fort McMurray.
>
> (Jan Dezentje et al., *supra*)

[156] The Cairns Group notes, in respect to this case, that the complaints in Jan Dezentje et al., *supra*, had no seniority protection of the type provided for under the VIA Rail contract.

D–Damages from Wrongful Dismissal

[157] VIA Rail's submission is that the most appropriate way to assess compensation as awarded in Decision 230 is by analogy to the rules used in wrongful dismissal cases. It suggests that, in awarding damages where reinstatement is not ordered, arbitrators have followed the common law approach of determining the period of reasonable notice appropriate to the circumstances. The employee then received a sum to cover lost earnings over that period subject to mitigation.

[158] The common law principles are well established in *Bardal* v. *Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.) and in Supreme Court of Canada cases from *Wallace* v. *United Grain Growers Ltd.* [1997] 3 S.C.R. 701 through to *Honda Canada Inc.* v. *Keays*, 2008 SCC 39; [2008] 2 S.C.R. 362.

[159] The employer relies upon three cases in support of this approach:

> *Re Carleton Place Police Services Board* and *Drummond* (2003), 120 L.A.C. (4th) 290 (Simmons) at pages 297–298
>
> *Re TISI Canada Inc.* and *Quality Control Council of Canada (Murphy)* (2007) 164 L.A.C. (4th) 186 (Casey)
>
> *Re Alberta* and *Alberta Union of Provincial Authorities (Van Steenoven)* (1999), 83

L.A.C. (4th) 436 (Moreau)

[160] In the *Re Carleton Place Police Services Board* and *Drummond*, *supra*, case, Arbitrator Simmons was dealing with compensation for a Chief of Police once a decision was made to disband the police force. He relied heavily on an earlier decision in similar circumstances (See *The Town of Wiarton and Chief Constable Alfred Schultz*, no. OPAC 88-021, June 15, 1988 (Ont. Arb. BD.) (Wiarton). That case set out the principles involved in wrongful dismissal cases, including the leading case in *Bardal* v. *Globe & Mail Ltd.*, *supra*, and then said, in applying these principles:

> I have concluded that this civil law principle of reasonable notice—adapted to specific realities of policing and the peculiarities of this situation—is adequate and appropriate as a guide for a settlement in this case. There are three reasons for this, the first of which is captured in the rhetorical question, "if not the principle of reasonable notice, then what?" Any decision regarding the quantum of compensation in an unjust dismissal situation must be based on some principle; it cannot be just random, or picked out of the air. I have been unable to come up with any better principled basis for a **decision**, not have I heard a better suggestion.
>
> Second, the principle of reasonable notice is not a blunt tool which makes an automatic decision. As suggested by Chief Justice McRuer, it is a concept which takes into account many disparate factors and (it is to be hoped) can be applied with both compassion and common sense. In short, it can be well adapted to the circumstances and, in this situation, its result made to reflect the unique aspects of policing and of the Wiarton situation.
>
> Third, in essence, the parties are agreed that the reasonable notice approach is appropriate, the only difference being that Mr. Cork argues that, in a case involving a Chief of Police, it should not be applied in exactly the same way as it might be in a civil court.
>
> For all of the above reasons, then, this award will be based on the common law principle of reasonable notice, adapted to the extent possible to the unusual circumstances of Chief Schultz and the **Wiarton** situation.
>
> (*Re Carleton Place Police Services Board* and *Drummond*, *supra*, pages 29–30)

[161] Neither the *Wiarton* case nor the *Re Carleton Place Police Services Board* and *Drummond*, *supra*, case deal with a collective agreement situation; the matters were arbitrated for statutory reasons. The decision in *Re TISI Canada Inc.* and *Quality Control Council of Canada (Murphy)*, *supra*, involved a termination for breach of an expectation of confidentiality during a harassment investigation. Arbitrator Casey found that the conduct deserved discipline but that termination was too harsh a penalty, and expressed the view that one month without pay would have been more appropriate. However, the arbitrator then went on to conclude that reinstatement to the

Fort McMurray office where the person harmed by the breach of confidentiality worked, was untenable and that the employment relationship was no longer viable. He ordered damages instead. The order was for eight months lost pay less the one month suspension, plus costs but less the proceeds of mitigation. Contrary to VIA's submission, it appears the employee's tenure was less than two years. The award contains no significant discussion of the principles on which this award was based, only the fact specific reasons.

[162] The *Re Alberta* and *Alberta Union of Provincial Authorities (Van Steenoven)*, *supra,* case, also involved a termination found to be excessive but where reinstatement was inappropriate. The order was to substitute a 21 month award for an employee with 27 years service. The employer in that case urged the Board to look to the severance and lay-off provisions as a guide. The union's submission was that:

> ... the grievor is entitled to a monetary award of one month's salary for every year of service for a total of 27 months for the period after the award was issued as well as full compensation less mitigated earnings for the period between the date of termination and the date of the award. In addition, the union asks that the award also include an amount for benefits, vacation pay and lost pension entitlements as well as interest.
>
> (page 440)

[163] The arbitrator rejected both approaches. He said:

> With respect, the panel is unable to agree with the union's approach. The fact that an employee has a right to seek reinstatement under a collective agreement in the event of an unjust dismissal, be it for culpable or non-culpable reasons, does not translate into an automatic right to reimbursement for the period from the date of dismissal to the date of the arbitration award if the grievance is upheld. The right to reinstatement is an important right and one which normally flows from a finding of a breach of the just cause provision. In the case where reinstatement is not appropriate, however, the issue becomes one of determining what damages flow from the breach.
>
> The most appropriate method of calculating damages in these cases in our view is to follow the common law approach, endorsed in both *Stech and Ulmer*, of determining the period of reasonable notice appropriate to the circumstances. The factors to be considered include those set out in *Bardal* v. *the Globe & Mail Ltd.* In addition, we also consider the security of employment provisions contained in the collective agreement as an important factor in assessing the proper notice period.
>
> (pages 447–448)

[164] It appears clear that the arbitrator in *Re Alberta* and *Alberta Union of Provincial Authorities*

(Van Steenoven), *supra*, rejected an approach based on a two part formula involving full reinstatement for lost pay, less mitigation from the time of dismissal to the date of the award, plus a common law severance award, based on years of service in addition, and used the common law test as a guide, but considered as well the security offered by a collective agreement as a factor affecting the appropriate length of that notice.

[165] In many more recent cases, arbitrators have considered assessing damages where reinstatement is not ordered using a modified common law approach. These are reviewed under the next heading.

E–Non-Reinstatement Damages in Arbitration

[166] A close analogy to the compensation question at hand involves the situation of employees under a collective agreement who are terminated without sufficient cause, and would generally be entitled to reinstatement, but due to some exceptional circumstances are not reinstated. Arbitrators have long held that they have the discretion to make a damages award in lieu of reinstatement. Any doubt as to their ability to do so has been removed by *Alberta Union of Provincial Employees* v. *Lethbridge Community College*, 2004 SCC 28; [2004] 1 S.C.R. 727.

[167] In arbitration, the remedy is very much the exception, which perhaps explains the limited number of cases assessing the applicable principles as well as the diverse circumstances in which the remedy has been applied. The parties referred to:

> *Re DeHavilland Inc.* and *C.A.W. Canada, Loc. 112 (Mayer)* (1999), 83 L.A.C. (4th) 157 (Rayner)
>
> *Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)* (2001), 99 L.A.C. (4th) 1 (Simmons)
>
> *Re Canvil* and *I.AM.A.W., Lodge 1547* (Stone) (2006), 152 L.A.C. (4th) 378 (Marcotte)
>
> *Deigan* v. *Canada (Treasury Board)* (1998), 51 CLAS 356 (Simpson)
>
> *Re Slocan Forest Products and IWA Canada Local 1-417*, [1996] BCCAAA 275 (Devine)

Re Northwest Territories Power Corp. and *Union of Northern Workers (Utye)* (1997) 72 L.A.C. (4th) 80 (Jolliffe)

Re Shaver Hospital and *C.U.P.E., Loc. 1742* (1991), 20 L.A.C. (4th) 122 (Rayner)

[168] Other authorities on the topic include:

Re NAV Canada and I.B.E.W., Loc. 2228 (Coulter) (2004), 131 L.A.C. (4th) 429 (Kuttner)

B.C. v. *B.C.G.S.E.U. (Nar Kambo Grievance)* (unreported decision, Steeves, 31 August 2009)

Re Cassellhome of the Aged and *C.U.P.E. Loc. 146* (2007), 159 L.A.C. (4th) 251 (Slotnick)

Re International Chemical Workers, Local 346 and *Canadian Johns Manville Co. Ltd.* (1971), 22 L.A.C. 396 (Weiler)

Re Health Sciences Center and C.U.P.E., Loc. 1550 (Werner) (2001), 96 L.A.C. (4th) 404 (Graham)

[169] *Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, involved a dismissed employee whose initial termination had been set aside but who was ultimately not reinstated. In the remedial award in that case, Arbitrator Simmons reviewed the approach to damages in such situations and came to a decision departing significantly from approaches followed up to that point.

[170] The facts of that case are set out in a preliminary award, reported at *Re Metropolitan Toronto (Municipality)* and *C.U.P.E., Loc. 79 (Dalton)* (1999), 78 L.A.C. (4th) 1 (Simmons). The grievor worked as a registered nursing assistant in a men's hostel. In 1994, he saw an altercation between two residents and intervened, grabbing one of the residents in a 15 minute neck lock. The resident died three days later. Statements were taken but nothing further was done at the time. A police investigation followed and the potential existed that a coroner's inquest might be convened.

[171] The inquest was in fact convened, during which certain statements came to the employer's attention. Disciplinary action was felt to be premature until after the inquest, but then the grievor

was terminated for his involvement in the death. This was on October 28, 1996, two and three quarter years after the incident itself. The union grievance proceedings took a long time due to the complexity of the issues and several preliminary objections. A decision on the merits was issued on February 14, 2001 (summarized at 63 CLAS 44). The Board found cause for discipline but also found that termination was unjust because a supervisor, similarly involved, had only received a cautionary letter. However, the arbitrator also found the employment relationship had become dysfunctional and declined to order reinstatement.

[172] The question then became what damages to award the employee in the circumstances for the loss of a job on October 28, 1996, when the conclusion not to reinstate only emerged from the arbitration process on February 14, 2001; four years and three months after the termination. Given the influence of this case on subsequent awards, it is worthwhile to review Arbitrator Simmons approach in some detail. He introduced the topic as follows:

> ... The question to be answered may be put in one of two ways. The most common way of putting the question is to ask what measure of damages is the grievor entitled to? Another way of putting it is to ask what monetary value should be assessed for the loss of employment the grievor has sustained because of his termination? While the question may invoke the same or similar thought processes, the answer may differ depending on which emphasis one applies when reaching a result. The approach ultimately adopted in this decision is to place more weight on the monetary value the grievor has lost rather than the measure of damages approach that has been followed by the courts in wrongful dismissal cases.
>
> (*Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, page 3)

[173] He began the decision by recognizing the historical approach:

> ... I agree with the proposition that arbitrators have generally followed the reasonable notice and mitigation requirements for wrongful dismissal as applied in the common law courts. ... Lately there has been a perceptible change in the approach taken to this issue both by counsel and arbitrators. They appear to be questioning the rationale for slavishly following the common law doctrine. Instead, arbitrators are beginning to look more closely at collective agreements with the concomitant protections and benefits they provide to members in the bargaining unit who fall within their ambit of protection. **There is a growing realization and acceptance of the view that collective agreements contain a value to a bargaining unit member separate and apart from what he would be entitled to if he was not covered by a collective agreement.** Arbitrators have been willing to adopt this approach to a certain extent but appear to have stopped short of embracing the collective agreement benefit concept totally and have clung tenaciously to segments of the common law doctrine such as mitigation of damages, among others.
>
> (*Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, page 6; emphasis added)

[174] He decided upon a new approach, saying:

> ... I believe it is time to review anew how an employee who is covered under a collective agreement ought to be compensated for loss of employment through dismissal without just cause but who is not reinstated to active employment with the employer.
>
> (*Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, page 7)

[175] He began with the proposition that a unionized employee, dismissed without cause, has a reasonable expectation of reinstatement. Only in rare situations are unionized employees found to have been dismissed without cause, not reinstated. *Alberta Union of Provincial Employees* v. *Lethbridge Community College*, *supra*, has since confirmed that a refusal to reinstate, while within an arbitrator's jurisdiction, is for exceptional circumstances.

[176] Arbitrator Simmons then reviewed several cases that introduced variants on the common law approach, based on the factors best outlined in *Bardal* v. *Globe & Mail Ltd.*, *supra*, and the duty to mitigate, best described in *Red Deer College* v. *Michaels*, [1976] 2 S.C.R. 324. The first point of distinction is alluded to:

> ... The most persuasive argument it seems to me, and one that is beginning to receive favourable attention, is the collective agreement provides various benefits that are non-existent in the non-unionized sector. One of the most obvious examples is seniority which extends a measure of security of employment not enjoyed by non-unionized employees. This security encompasses, among other things, bumping privileges against lay-offs, promotions within the workforce based on certain defined criteria, and no discipline without just cause. ...
>
> (*Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, page 8; emphasis added)

[177] As a second point, he noted cases that "grossed up" wage loss damages on account of collectively bargained fringe benefits. This is not a departure from the common law approach, which also allows compensation for fringe benefits and similar losses, subject to the remoteness, foreseeability, and mitigation limits. The technique of grossing up the basic wage rate for collectively bargained benefits is just a rough and ready way of quantifying the value of such benefits. He referred to the decision in *Re DeHavilland Inc.* and *C.A.W.–Canada, Loc. 112 (Mayer)*, *supra*, and

concluded that Arbitrator Rayner, in that case:

> ... adopted a measure of damage in the form of lost compensation based on the economic value of being a member in a bargaining unit and the recipient of all of the benefits and protection that a collective agreement provides. That is, the measure of damage is the payment of lost compensation, plus benefits, in lieu of reinstatement to compensate the employee for losing his rights and benefits contained in the collective agreement.
>
> (*Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, page 9)

[178] He then turned to the question of mitigation of damages which is perhaps the most controversial part of his ruling. The award uses, as its starting point, Arbitrator Graham's decision in *Re Health Sciences Center* and *C.U.P.E., Loc. 1550 (Werner)*, *supra*, of which he said:

> That is not unlike the instant situation. The grievor was seeking lost compensation for past and future earnings for a total of $376,543.65. The employer took the position the grievor was entitled to compensation that would be equivalent to between two weeks and one month's salary for every year of service to the date of her termination less any moneys earned following her termination. Ms. Werner had 11 1/4 years' service at the time of her termination. According to the employer's calculation the grievor was entitled to approximately $20,000. Arbitrator Graham dismissed the claim for future earnings. His comments at p. 5 are interesting. He writes [at pp. 407–8 L.A.C.]:
>
> "In my view, an appropriate starting point for the consideration of the compensation to be paid to Werner is an assessment of the various factors enunciated in cases such as *Bardal* v. *Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.).
>
> Having considered some of the common factors referred to in such cases, such as the length of service of the employee, the character of the employment, and the age, training and experience of the employee, I have also considered the loss of Werner's rights under the collective agreement. As arbitrator Rayner pointed out in *Re DeHavilland Inc.* and *C.A.W.-Canada, Loc. 112 (Mayer)* (1999), 83 L.A.C. (4th) 157, to simply replicate a notice period "ignores the economic value of being a member of bargaining unit, and the ... protection that a collective agreement brings" [p. 162].
>
> It is very difficult to assess with any precision the value of being a member of a particular bargaining unit, or the extent of protection afforded by a particular collective agreement."
>
> (*Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, page 10)

[179] In making his award in *Re Health Sciences Center* and *C.U.P.E., Loc. 1550 (Werner)*, *supra*, Arbitrator Graham had used a modified formula based on length of service, but offset monies earned in mitigation during that period. However, he also structured the payment, as described at page 410 of the *Re Health Sciences Center* and *C.U.P.E., Loc. 1550 (Werner)*, *supra*, award:

> I therefore order that the sum of $25,924.13 plus interest as directed herein be paid to Werner as a retiring allowance consequent upon the loss of her office or employment. This means that there will be the requisite withholding on account of income tax only, subject to the right of Werner, at her option to roll a portion of this retirement allowance directly into an RRSP. I decline to award any additional amount as a "tax gross up" for several reasons, one of which is that Werner may be able to reduce the amount of income tax immediately payable by directing that a portion of the retirement allowance be paid into a RRSP.
>
> (page 410)

[180] Referring to *Re Health Sciences Center* and *C.U.P.E., Loc. 1550 (Werner)*, *supra*, Arbitrator Simmons said:

> I decline to adopt the *Health Sciences* mitigation requirements. I prefer, with respect, arbitrator Rayner's view that the collective agreement value be factored into the award of compensation without regard to the employment standards legislation or mitigation when the ordinary remedy of reinstatement is disallowed. The remedy is to compensate the grievor an amount of money representing, as closely as possible, the monetary value for his loss of employment. That remedy represents, in large measure, the loss of the value of the collective agreement. It does not represent an ongoing loss from the time of termination which would normally require mitigation. The collective agreement has been breached by the employer. The employment relationship has come to an end as a consequence of the employer's breach of the collective agreement. The grievor is not being reinstated into his employment. The employee has suffered a loss because of that breach. The monetary value of the loss of employment is determined by the payment of a sum of money instead of reinstatement. It is a fixed sum without regard to what may happen following the breach. Mitigation ought not to play any role in the final outcome. The remedy should represent, as close as one can reasonably determine, the monetary value for the loss of employment.
>
> (*Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, page 11; emphasis added)

[181] The result in *Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton)*, *supra*, was as follows:

> ... The grievor had been employed 14 years and 8 months. He was 50 years of age when dismissed in October 1996. I believe rounding out his employment to 15 years would not be inappropriate. I agree with the employer that the date of termination and not that of the award is a proper date for calculation purposes. He is to be compensated in the form of a retiring allowance calculated at one and one-quarter month's salary for each year of service in addition to a fringe benefit factor of 15 per cent. I am informed his hourly wage rate at termination was $17.50 and he worked 40 hours per week. This brings his annual wage total to $36,400.00 which converts to $56,875.00 for 18.75 months. Added to that amount will be $8,531.25 representing the 15 per cent fringe benefit factor.
>
> Therefore, the grievor is to receive $56,875.00 plus $8,531.25 for a total of $65,406.25. Interest at the rate of 5 per cent per annum shall be added to the total amount from October 28, 1996 to the date it is paid to the grievor.
>
> (page 12; emphasis added)

[182] Arbitrator Rayner's decision in *Re DeHavilland Inc.* and *C.A.W. Canada, Loc. 112 (Mayer)*, *supra*, involved a terminated employee whose termination the arbitrator proposed to replace with reinstatement but without compensation, but with full seniority. The employer argued that this was one of the exceptional cases where reinstatement was not viable. The arbitrator described two issues he had to resolve: (a) whether to order reinstatement and (b) an appropriate quantum of damages should he decide not to reinstate. He began by emphasizing the need to keep the two issues separate:

> I shall deal with both issues separately as it is crucial to keep both issues apart. One should not influence the other as the issue of compensation turns on the value that one places on the seniority rights, wages and benefits that an employee has under a collective bargaining regime as compared to his or her situation as an applicant for a new position with a new employer. Past conduct may be extremely relevant in determining whether reinstatement is appropriate but has no relevance once one decides that the employee should not be reinstated. The past conduct would have been taken into account first when one determined that the discharge was too severe and secondly when the decision is made not to reinstate. To take that conduct into account, either explicitly or implicitly, when awarding compensation is to misconstrue the nature of the compensation awarded in lieu of reinstatement. That compensation is for the loss of the employee's rights, privileges, and benefits under the collective agreement and the question is not to be coloured in any way by the conduct of the employee which might have influenced the decision not to reinstate.
>
> (page 158)

[183] It is an important question whether past conduct influences the "value one places" on such rights as seniority. It depends in part whether this is a wholly objective assessment based on a normal employee, or whether it is more subjective; depending on the value the particular employee puts on those rights. An employee who has experienced workplace difficulties and significant discipline might well value future prospects, with that employer, lower than employees who perceive themselves as less vulnerable, and therefore less likely to face difficulties in the future.

[184] This is not unlike the seniority, or years of service factor said to justify higher awards. Under a collective agreement with significant rights attached to seniority, any long standing employee is more secure than a more recent employee, based on the "last in first out" approach, and on the higher job loss benefits (for example, upon layoff) usually accorded such employees. Of earlier cases, Arbitrator Rayner concluded:

> ... none of the cases discuss the basis on which compensation should be calculated and that no theory or reasons for the amount given are stated in any of the cases.
>
> (*Re DeHavilland Inc.* and *C.A.W.-Canada, Loc. 112 (Mayer)*, *supra*, page 161)

[185] He went on to explain his own award by saying:

> ... the payment of compensation in lieu of reinstatement is to compensate the employee for losing his rights under the collective agreement. ... the compensation is not merely to replicate any notice period, or payment of moneys in lieu thereof under Employment Standards legislation. In my view to base compensation on what would have been received under that legislation ignores the economic value of being a member of a bargaining unit and the recipient of all the benefits and protection that a collective agreement brings. It is for loss of that protection and those benefits that compensation is awarded. ... Since in most of the cases ... employees of the grievor's seniority would receive about 5 months' wages under Employment Standards legislation, to award 6 months' wages would be to place a minimal, and in my view an unrealistic, value on the benefits of working under a collective bargaining regime.
>
> A better, albeit not totally analogous, comparison would be to early retirement severance packages that are given to unionized employees. Although there was no evidence led as to the amounts awarded under those packages, I believe that an amount equal to one month's wages for every year of seniority, together with a 15% payment for loss of fringe benefits, would be an appropriate payment to reflect the loss of coverage under the collective agreement. In the grievor's case that would be 12 months.
>
> As I already stated, compensation for loss of collective agreement rights should not be confused with severance pay under the *Employment Standards Act*, R.S.O. 1990, c. E. 14. In order to maintain that dichotomy the grievor is to receive in addition to the compensation already set out that amount that he would have received under the *Employment Standards Act*.
>
> (*Re DeHavilland Inc.* and *C.A.W.-Canada, Loc. 112 (Mayer)*, *supra*, pages 161–162)

[186] *Re NAV Canada* and *I.B.E.W., Loc. 2228*, *supra*, also involves an employee not reinstated due to a total breakdown in the relationship. He had previously been dismissed and then reinstated by Arbitrator Kuttner. He was dismissed again for new conduct and once again succeeded in challenging the discipline, but this time he was not reinstated. The employer was directed to pay damages for having dismissed the grievor without just cause. Both incidents involved serious insubordination but ultimately, despite the repeated offence, the arbitrator decided that:

> ... the mental and emotional state of the grievor coupled with his many years of service and otherwise clear disciplinary record are critical mitigating factors; the ultimate penalty of discharge was not warranted in all of the circumstances and I substitute therefore a suspension of three weeks duration.
>
> (page 438)

[187] The grievor sought damages of about $500,000 as a result of termination. This was split between lost pay from the time of termination to the arbitration, less the three-week suspension, plus a 15% gross-up. He also sought a severance package for 17.5 months pay grossed up by 15%, two years salary as a retiring allowance, reimbursement for some personal debt and $200,000 damages for pain and suffering. The employer argued, in part, that the contract's layoff provisions provided the best analogy for an appropriate value of the loss.

[188] The arbitrator dealt, at the outset, with the notion that the award should be both retrospective and forward looking, saying at paragraph 26:

> [26] Both the Union and the Employer appear to be under the misapprehension that my Award is to be bifurcated: compensation for the period between date of dismissal and the date of the Letter Award to be calculated on the basis of wages lost by reason of unjust dismissal as in the ordinary case; and damages in lieu of reinstatement as of the date of my Letter Award to compensate the grievor for loss of his rights under the collective agreement. But in my view to calculate the quantum of compensation in this manner is counterintuitive. It is in effect, to order reinstatement of the grievor for a fixed term (from the date of dismissal to the date of the Award) measuring compensation on the basis of wages lost, followed by a deemed termination of employment with "severance pay" calculated on the basis of so many weeks' or months' pay per year of service. But the fact of the matter is that my award is for damages in lieu of reinstatement and absent an order of reinstatement there is simply no retroactive back pay owing whatsoever. The whole point is to grant relief solely by way of damages. There is no basis for bifurcation of the remedial order premised upon the date of issuance of my Award.
>
> (*Re NAV Canada* and *I.B.E.W., Loc. 2228, supra*)

[189] Arbitrator Kuttner then concluded:

> [27] ... In much of the traditional jurisprudence the rationale for determining an appropriate quantum of damages in lieu of reinstatement has been unarticulated, and we find formulae for a person of the grievor's length of service in the range of 5- to 6-months' wages at most. *Re Deigan* and *Re Slocan Forest Products, supra*, are examples. ...
>
> (*Re NAV Canada* and *I.B.E.W., Loc. 2228, supra*)

[190] He then identified *Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79 (Dalton), supra*; and *Re DeHavilland Inc.* and *C.A.W.-Canada, Loc. 112 (Mayer), supra*, as representing a:

> [27] ... move away from an approach to the issue of damages which mirrors the common law or employment standards legislation in favour of one tailored to the unionized sector, which is characterized by collective agreements that provide a wide range of benefits simply non-existent in the non-unionized sector. Many are easily quantifiable in monetary terms, *e.g.*, overtime and premium pay benefits, sick leave benefits, disability benefits and health care benefits. Others are not so easily quantifiable, the most

> important of which is the concept of seniority which enhances both the security and quality of employment. Nevertheless they are of an economic value and should be taken into consideration in quantifying damages to be paid in lieu of reinstatement.
>
> (*Re NAV Canada* and *I.B.E.W., Loc. 2228, supra*)

[191] This approach, he reasoned:

> [28] ... eschews the interposition of statutory or common law concepts to lessen an award premised on the economic value of being a member of a bargaining unit under the protective umbrella of the collective agreement. ...
>
> (*Re NAV Canada* and *I.B.E.W., Loc. 2228, supra*)

[192] He noted that Arbitrator Rayner in *Re DeHavilland Inc.* and *C.A.W. Canada, Loc. 112 (Mayer), supra*, had accepted the analogy to early retirement severance packages but found the "declared surplus" or layoff provision only gave "some direction" not a "precise formula" given their different triggering circumstances. He accepted the approach of rounding up years of service and then applying a 1.5 months per year of service formula. He also accepted the 15% "fringe benefit factor."

[193] He confirmed that his award was in addition to the statutory severance pay to which the employee was entitled under employment standards legislation. The claims for a retiring allowance, debt repayment and pain and suffering were denied without elaboration. Lastly, the arbitrator directed (or at least recorded the parties' agreement) that [at paragraph 31]:

> [31] ... payment of the compensatory award of damages here made will, on written direction from the grievor, be disbursed in a lawful manner with a view to minimizing any tax consequences.
>
> (*Re NAV Canada* and *I.B.E.W., Loc. 2228, supra*)

[194] In *Re Cassellholme Home for the Aged* and *C.U.P.E., Loc. 146 (Morabito), supra*, Arbitrator Slotnick decided not to reinstate an employee and directed the parties to try to agree on a compensation package in lieu. He then reviewed the earlier cases discussed above, saying at pages 253–254:

> Arbitrators have taken a variety of approaches to this issue, but most of the recent cases have agreed that the common-law approach of reasonable notice that is used in wrongful dismissal cases should not apply any more in determining compensation for the loss of a unionized position.
>
> (pages 253–254)

[195] He nonetheless decided to base his award on years of service and explained why:

> In basing the compensation primarily on years of service - which at first glance seems not to differ much from the usual reasonable notice approach in the non-unionized setting - some arbitrators have pointed to the key role of seniority in unionized workplaces, noting that job security and other rights and benefits are increased as an employee's seniority grows. In effect, a long-service employee is losing more than a short-service worker when he or she is not reinstated, and not just in job security. One relevant example in the Cassellholme collective agreement is sick leave credits, which are accumulated, 18 days annually, to a maximum of 260 days, and in some circumstances can be cashed out.
>
> (*Re Cassellholme Home for the Aged* and *C.U.P.E., Loc. 146 (Morabito)*, *supra*, pages 254–255)

[196] Like *Re Metropolitan Toronto (Municipality) and C.U.P.E. Loc. 79 (Dalton)*, *supra*, he decided not to take subsequent earnings into account as mitigation since the award did not represent an ongoing loss of wages from the date of termination. The award appears to support the view that the grievor's conduct in the case should not influence the remedy. However, Arbitrator Slotnick qualified this somewhat by saying:

> I cannot agree with the employer's contention that Ms. Morabito was clearly on the road to dismissal, although that certainly is a possibility. For that matter, I cannot agree with the union's statement that she would have worked at Cassellholme until retirement.
>
> ...
>
> ... the current exercise, in my view, has little or nothing to do with fault as that issue was dealt with in my earlier decision. Ms. Morabito must be compensated fairly; at the same time, given the apparent tension in the workplace resulting from the incident and Ms. Morabito's discharge, the compensation must not be in the range where it will be viewed as a reward for her misconduct.
>
> (*Re Cassellholme Home for the Aged* and *C.U.P.E., Loc. 146 (Morabito)*, *supra*, pages 255–256)

[197] In the result, he set the grievor's damages at 1¼ months pay for 20 years of service, with a 15% top-up for loss of benefits, and interest at 4%. To allow some reduction of the tax consequences he directed:

> ... payment to be made within 60 days of the date of this award; the employer will comply with any lawful requests by the grievor to disburse the money with minimum tax consequences, such as directly to an RRSP, providing she forwards the required forms in a timely manner.
>
> (*Re Cassellholme Home for the Aged* and *C.U.P.E., Loc. 146 (Morabito)*, *supra*, page 256)

[198] *Cameco Corp.* v. *U.S.W.A., Local 8914* (2008), 179 L.A.C. (4th) 97 (Dawson), is a judicial review decision concerning an arbitration award of damages based on the following calculation, described in the judgment at paragraph 9:

> [9] ...
>
> "[195] The calculation of compensatory damages is a difficult one. My research would indicate that Arbitrators have generally used an employee's length of service as a starting point and then topped that up to account for the loss by the employee of his seniority rights and his tenure of employment, i.e. his right to be reinstated if discharged for other than just cause. Arbitrators have varied between 1.25 and 1.75 months of pay for each year of service in their awards. In my opinion, the loss of an employee's Collective Bargaining benefits is significant and the compensatory damages ought to reflect that. I believe that an award of two months' salary for every year of service, together with an award of 25 percent of the salary representing Collective Bargaining Agreement benefits (included in that figure is a factor representing overtime the Grievor might have been expected to work), the benefits payable under Section 235 of the *Canada Labour Code*, together with interest at 5 percent per annum, compounded from February 13, 2006 to the date of payment, would be an appropriate award."

[199] The employer argued that this award was unreasonable as to the two months per year figure plus the 25% gross-up for benefits. Further, it was unreasonable in that no determination was made as to what an appropriate level of discipline would have been. As to the failure to determine appropriate disciplines, the Court ruled at paragraph 20:

> [20] Cameco's argument that the arbitrator failed to determine the appropriate disciplinary response prior to calculating the monetary award fails to recognize that compensation in lieu of reinstatement is a lesser form of penalty than dismissal. It has been recognized by the courts to be so on many occasions. In *U.S.W.A., Local 12998* v. *Liquid Carbonic Inc.*, *supra*, the Ontario Divisional Court upheld the decision of an arbitrator who decided that there was not just cause to support the dismissal of the grievor, but then imposed the lesser penalty of compensation in lieu of reinstatement. ...

[200] The Court noted a Newfoundland decision to like effect: *Newfoundland Association of Public Employees* v. *Brink's Canada Limited* (1999), 99 CLLC 220-075.

[201] As to the use of a two months per year factor, the Court found this high but not unreasonably

so. It continued, at paragraph 27:

> [27] ... The payment of compensation in lieu of reinstatement is a payment to compensate the employee for being wrongfully terminated and unable to continue under the collective agreement. The compensation is not simply to replicate the notice period in common law.
>
> (*Cameco Corp.* v. *U.S.W.A., Local 8914, supra*; emphasis added)

[202] As to the use of the 25% for top-up benefits, the Court found this was a determination the arbitrator could make on the evidence before him. The Court made the following comment about the value and nature of such benefits:

> [34] Most of the benefits under the collective agreement are easily quantifiable in monetary terms and can be valued as costs to the employer, such as premium pay benefits, sick leave benefits, disability and health care benefits. Others, such as seniority rights and protection from wrongful termination, which enhance the security and quality of employment, are important benefits to the employer but are not "costs" to the employer ("non-costs benefits"). Nevertheless they have value.
>
> [35] The arbitrator here had before him evidence upon which he could make an assessment of the value of being a member of this collective bargaining unit. He had the applicable collective agreement and the provisions therein, which afforded the grievor protections and enhanced his job security, as well as the other provisions which provided him benefits. He also had some evidence of overtime opportunity.
>
> [36] The arbitrator had evidence before him as to the cost of certain of the collective bargaining agreement benefits including health, dental, pension, vacation. He had the evidence of the lost opportunity of overtime. The arbitrator also had evidence of the "non-cost benefits". The arbitrator here had evidence before him to make the finding which he ultimately made.
>
> ...
>
> [44] ... most of the benefits under the collective agreement are easily quantifiable in monetary terms and can be valued as costs to the employer, such as premium pay benefits, sick leave benefits, disability and health care benefits. Others, such as seniority rights and protection from wrongful termination, which enhance the security and quality of employment, are important benefits to the employee but are not "costs" to the employer ("non-costs benefits"). Nevertheless they have value. All of these benefits, even those not precisely quantifiable, must be taken into account in quantifying damages in lieu of reinstatement. It is very difficult to assess with precision the value of being a particular member of a particular bargaining unit under a particular collective agreement.
>
> (*Cameco Corp.* v. *U.S.W.A., Local 8914, supra*)

[203] *B.C. (Nar Kambo)* is a case where the arbitrator was persuaded that analogous collective agreement clauses provided a useful guide to the "value of the agreement." Arbitrator Steeves cited three B.C. cases in support of that approach:

B.C. Ferries Services Inc. v. *B.C. Ferry and Marine Workers' Union (Rayner Grievance)*, [2005] B.C.C.A.A.A. No. 68 (McPhillips)

Vantel/Safeway Credit Union v. *Canadian Office and Professional Employees Union, Local 15 (Anderson Grievance)*, [2006] B.C.C.A.A.A. No. 113 (Blasina)

Canadian Blood Services v. *Hospital Employee' Union (Bagley Grievance)*, [2004] B.C.C.A.A.A. No. 308 (Jackson)

[204] In *Canvil*, *supra*, the reason reinstatement was not viable related primarily to the employee's deteriorating health. As in other cases, the arbitrator was faced with widely divergent positions as to the amount of, and principles underlying, the various possible heads of damages. Arbitrator Marcotte to concluded:

> ... arbitration awards that deal with the matter of compensation in cases of non-reinstatement demonstrate a variety of approaches in determining the amount of compensation.
>
> (*Canvil*, *supra*, p. 390)

[205] He undertook a thorough analysis of many cases that set damages in such circumstances, identifying four that attempted to grapple with the "appropriate approach to that determination" [of damages]: *Re Alberta* and *Alberta Union Provincial Authorities (Van Steenoven)*, *supra*; *Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79*, *supra*; *Re NAV Canada and I.B.E.W., Loc. 2228*, *supra*; and *Re DeHavilland Inc.* and *C.A.W. Canada, Loc. 112 (Mayer)*, *supra*. Based on these cases, Arbitrator Marcotte listed (in no particular order) his conclusions about the appropriate factors to be considered in such an award:

> • The remedy is to compensate the grievor for his loss of employment and loss of rights, benefits and privileges under the collective agreement.
>
> • The remedy does not represent on-going loss of wages from the time of termination of employment; accordingly mitigation is not a factor in determining the amount of damages.
>
> • The common law regime in cases of unjust dismissal under a collective agreement does not apply.
>
> • The grievor's conduct leading to the decision to discharge and the decision not to reinstate him to his employment is not a relevant factor.
>
> • The remedy is not to replicate any notice period or monies in lieu of notice under the *Employment Standards Act*.

> • The grievor is entitled to monies that he would receive under the relevant provisions of the *Employment Standards Act*.
>
> • The remedy includes a percentage factor related to loss of fringe benefits available under the collective agreement.
>
> • The grievor's personal circumstances including, but not limited to, his years of service and age at the time of dismissal, education, and, employment prospects are relevant factors to be considered.
>
> (*Canvil*, *supra*, page 397)

[206] In the end result, he awarded the grievor 31 months pay based on 31 years of service. He deducted a 30-day suspension. He grossed up the wages by 15% for fringe benefits and included a further 34 weeks for Employment Standards severance and notice benefits.

[207] The role of mitigation is discussed in: *Saskatchewan Center of the Arts* v. *I.A.T.S.E., Local 295*, 2008 SKCA 136; (2008), 301 D.L.R. (4th) 439. The employee had been wrongfully dismissed, but bad feelings between the grievor and his colleagues led to an award of damages in lieu of reinstatement. The arbitration board set the damages after considering the approaches in *Re Metropolitan Toronto (Municipality)* and *C.U.P.E. Loc. 79*; *Re NAV Canada* and *I.B.E.W., Loc. 2228*, *supra*; *Re DeHavilland Inc.* and *C.A.W. Canada, Loc. 112 (Mayer)*, *supra*; and *Re Health Sciences Center* and *C.U.P.E., Loc. 1550 (Werner)*, *supra*. It expressly did not take post-termination earnings into account. However, it did base its award on a formula. The employee had worked for 17 years and was awarded 5 weeks salary per year plus a 14% top-up plus eight weeks pay in lieu of labour standards legislation notice and interest.

[208] The Saskatchewan Court of Appeal decided reasonableness was the appropriate standard for review. In doing so it acknowledged that:

> [12] ... the assessment of damages in cases such as this involve some considerations quite different from those in common law wrongful dismissal cases, and these considerations call into play the special expertise developed by labour arbitrators.
>
> (*Saskatchewan Center of the Arts* v. *I.A.T.S.E., Local 295*, *supra*)

[209] The Court accepted that reinstatement is the presumptive remedy in arbitration and that the remedy affords unionized employees greater security of tenure than those under common law

contracts. The Court also acknowledged the developments in arbitration noted above, summarizing the reasons for the change at paragraphs 18–19:

> [18] The reasons for the move by the arbitrators from the common law measurement of loss by means of an express or implied notice period are obvious. The first reason is that this collective agreement, like most collective agreements, does not allow for dismissal by notice, but allows dismissal only for cause. The second is that the common law method makes no allowance for many benefits conferred by collective agreements that are not available under non-collective agreement employment contracts. The most obvious is the right to reinstatement, not available as a common law remedy, which gives much greater security of tenure. Other benefits not available under non-collective agreement contracts will depend on the individual collective agreement, but in most cases they are substantial. They include such things as seniority privileges including bumping privileges against lay-offs, promotions within the workforce on the basis of seniority, and no discipline without just cause.
>
> [19] These arbitrators have held that a more appropriate way of measuring these damages would be to assess them on the basis not of reasonable notice, and loss of income during that period, but on a basis of loss of future employment with the protection of the collective agreement. Some of the awards have characterized the amount awarded as a retirement allowance. They say, on this basis, that the loss is crystallized at the date of termination of the employment and thus is not subject to the common law requirement to mitigate. To repeat the words of one of the arbitrators: "It does not represent an ongoing loss from the time of termination which would normally require mitigation."
>
> (*Saskatchewan Center of the Arts* v. *I.A.T.S.E., Local 295*, *supra*)

[210] However, the Court then noted that the awards, while "somewhat unclear," begin by considering the same factors used in the common law tests, albeit with some additional factors added in.

[211] The Court then set out the mitigation principles. It found unreasonable the board's failure to apply the principles in *Red Deer College* v. *Michaels*, *supra*. It began by finding that there was nothing inherently unreasonable in valuing collective agreement benefits:

> [22] Leaving aside the matter of duty to mitigate damages, insofar as the arbitration award in this case, and the awards that it followed purported to act in accord with this principle, one would be hard pressed to conclude they are unreasonable. Although they claimed to change the basis of their assessment of damages from calculating them on the basis of a period of reasonable notice, they all clearly stated that "the remedy is to compensate the grievor an amount of money representing, as closely as possible, the monetary value for the loss of employment" or similar terms (the award, paras. 157 to 158). Accordingly, there is nothing inherently unreasonable about considering the loss of benefits conferred by a specific collective agreement as a matter of general principle when damages are assessed whether one assesses on the basis of a reasonable notice period or not as it is in accord with common law principles. (And we note that the board considered essentially the same factors as a court considers when determining a reasonable period of notice, such as the length of the period of employment, the age of the grievor, the responsibility of the position held and so on.)
>
> ...

> [25] As noted above the fundamental principle in assessment of damages for breach of contract is that the wronged person is entitled to be put into the same position as if the contract had been performed and the board, and the awards it followed seemed to have accepted that principle. The damages claimed are compensatory damages, that is, damages to compensate for actual loss. There was no claim for punitive or aggravated damages and the board did not suggest that such damages were appropriate, so that the damages cannot have any element of punishment of the employer. Notwithstanding the insistence in the awards followed by the arbitration board in this case that the loss "does not represent an ongoing loss from the time of termination which would normally require mitigation", that cannot be so. The damages in such cases, including the damages for loss of benefits under the collective agreement, are to compensate for the loss of the employment that the grievor would have had, but for his termination, after the date of his termination. There can be no loss until the grievor has been without employment and without compensation for that loss of employment or has taken employment providing lesser remuneration or benefits. That being so, the damages simply cannot be disconnected from what happens after the termination.
>
> [26] And a corollary of this is that any income earned by the grievor from another employment after the termination must be taken into account to the extent that it alters the actual loss. Otherwise, it is conceivable that a person in the position of the grievor could collect substantial damages far exceeding his actual loss. For he could begin a new job with equal or better pay and benefits commencing soon after his termination and suffer very little loss, yet collect full damages. That is what happened here. The grievor was awarded 85 weeks of salary when he was out of work for about six months, or 26 weeks. Neither simple logic nor the law allows such a result because the damages would no longer serve only the purpose of compensating the grievor for his actual loss, but to reward the grievor and punish the employer. In sum, it was unreasonable of the board to find that earnings of the grievor after termination should not be taken into account in assessing damages because that would compensate the grievor for a loss that he did not in fact incur.
>
> (*Saskatchewan Center of the Arts* v. *I.A.T.S.E., Local 295, supra*)

[212] At paragraph 27, the Court disposed, somewhat summarily, of the argument that the loss could be considered analogous a retirement allowance:

> [27] As for the suggestion that damages in such cases be considered to be retirement allowances, the collective agreement in this case does not entitle an employee dismissed without cause to a retirement allowance, and there is no reasonable basis to imply such a term.
>
> (*Saskatchewan Center of the Arts* v. *I.A.T.S.E., Local 295, supra*)

F–Court Decisions on Damages in Lieu of Reinstatement

[213] Court decisions have grappled with some of the same issues from slightly different perspectives. In each case, the right to reinstatement had been already established, in one case by agreement and a confirmatory Court decision and in others by an arbitration award. In each case, the question involved the appropriate measure of damages to the employee who had nonetheless not

been reinstated. The earlier case is: *Rankin* v. *National Harbours Board* (1979), 99 D.L.R. (3d) 631 (B.C. S.C.), varied on appeal in *Rankin* v. *National Harbours Board* (1981), 127 D.L.R. (3d) 714 (B.C. C.A.).

[214] Mr. Rankin worked for the National Harbours Board as a field inspector. He was covered by a collective agreement and represented by the Longshoremen's Union. He was a seven-year employee at the time of termination. He was dismissed for removing a power saw without permission. The arbitration board ordered that a lesser penalty (later agreed upon as a one month suspension) be substituted for the termination. The Employer, however, refused to reinstate Mr. Rankin to his job. The Trial Court discussed whether it had jurisdiction over the case and decided that it did. It found, at paragraph 14:

> [14] The National Harbours Board was obliged to restore Rankin to his former position of field inspector. Failure to do so is a breach of both the collective agreement and the statutory obligation.
>
> (*Rankin* v. *National Harbours Board (1979)*, *supra*)

[215] At paragraph 18, the Trial Court found that:

> [18] ... no interpretation of the contract is required to determine whether there has been a breach and the measure of damages does not depend on either the interpretation or the application of the agreement.
>
> (*Rankin* v. *National Harbours Board (1979)*, *supra*)

[216] The Court then rejected the argument that the breach would simply give rise to common law damages for reasonable notice and went on to assess damages on a broader basis. However, this assessment was significantly varied by the Court of Appeal and it is their framework for analysis that is significant. By the time of the appeal judgment, all jurisdictional and procedural issues had been resolved or waived so the only question before the Court was the appropriate measure of damages for a refusal to reinstate. The Court of Appeal, at paragraph 30, recapped the evidence.

> [30] In summary, that evidence indicates the presumed loss of earnings during the period of eight years, three months, from April 1970 to June 1978, of approximately $75,000, or with pension included, approximately $81,000. These figures also indicate an estimated value of the future wage loss to the plaintiff's retirement date at age 65 of $46,000. The plaintiff was born in 1920. The result of those

> calculations would give a wage loss of $126,000, approximately, before the application of the discount that would be regarded as appropriate for contingencies, and before consideration is given to any allowance for mitigation over and above the actual record of earnings of the plaintiff.
>
> (*Rankin* v. *National Harbours Board (1981), supra*)

[217] The Court then referred to an English case on point and went on to discuss the difficulty of, but nonetheless the necessity for, assessing (but not calculating in any formulaic way) future lost income:

> [31] Both counsel have referred to the decision of the English Court of Appeal in *Edwards* v. *Society of Graphical and Allied Trades* [1971] Ch. 354, [1970] 3 All E.R. 689 (C.A.). That was a case of expulsion from union membership which prevented a man 25 years in the trade from exercising his trade. On the facts, therefore, it is distinguishable from this case, but the measure of damages may be very similar, and the approach to the damages that was taken in that case seems to me to be an appropriate approach both there and here. Lord Denning said at p. 697:
>
> "Such being the wrongful exclusion, how are the damages to be measured? I think that they are to be ascertained by putting the plaintiff in as good a position, so far as money can do it, as if he had never been excluded from the union, taking into account, of course, all contingencies which might have led to him losing his employment anyway: and remembering, too, that it was his duty to do what was reasonable to mitigate the damage. ... I feel that damages in such a case as this are so difficult to assess that I would be inclined to view them somewhat broadly."
>
> [32] Both Lord Justice Sachs and Lord Justice Megaw make very much the same observation with respect to broad consideration of the damages. At p. 705 Megaw L.J. says:
>
> "Where there are so many incalculable, it would not be right to seek to give an aura of scientific respectability to the assessment of future damages by purporting to apply arithmetical or actuarial formulae to the assessment, or to any individual factor on which the assessment partly depends. One must try to assess. One cannot calculate."
>
> [33] In this case there are two major imponderables. The first is contingencies, and the second is mitigation. Neither is susceptible to mathematical calculation. The calculations given to us by counsel for the appellant are a useful tool in making the assessment, but they do not lead directly to a mathematical computation of a damage award and it would be improper to treat them in that way.
>
> [34] We are not obliged to go on with the mathematics and reach a percentage figure for the contingencies and another percentage figure for the likelihood of future mitigation, or better mitigation in the past, and so produce an equation with all the gaps filled in that would tend to obscure the real process of arriving at the damage award.
>
> (*Rankin* v. *National Harbours Board (1981), supra*)

[218] The Court then discussed the type of contingencies that might be taken into account in assessing future potential income. They said at paragraphs 38–39:

[38] In my opinion, any future consideration of Mr. Rankin's performance as an employee in the context of future discipline proceedings could have taken into account the prior discipline hearing and the particular award of the arbitrators, including their comment that had they been asked a question with respect to a sanction other than dismissal they might well have found such a sanction appropriate; so Mr. Rankin would be continuing his employment with the prospect of any future disagreement with his employer about his performance to be assessed on the basis of the past arbitration award, and that remains a very important contingency.

[39] Other contingencies would be the prospect that the union agreement would change with respect to seniority, that the redundancy provisions might become applicable to the position occupied by Mr. Rankin, that he would become sick or die or be in an accident on the job, that he would resign for better employment or, as I have said, that he might be dismissed for cause or demoted.

(*Rankin* v. *National Harbours Board (1981)*, *supra*)

[219] On mitigation, the Court said:

[40] In relation to mitigation, we must assess the likelihood that he would obtain employment on a continuous basis after the trial, and we must also assess the possibility that he could have obtained better employment before the trial if he had not been concentrating so hard on winning back his position as a field inspector with the National Harbours Board.

[41] The trial judge, indeed, has this to say on that aspect of mitigation [pp. 639-40]:

"I believe that Rankin has tried to mitigate his loss but much of this activity and the evidence generally reveal a belief and desire to achieve reinstatement with the National Harbours Board as a field inspector. There comes a time when one may have to recognize that goals sought are not attainable and other sights must be set. Mr. Rankin should have recognized the impossibility of reinstatement years ago."

[42] As I understand that finding, on the basis of the evidence to which we have been referred, Mr. Rankin was assiduously endeavouring to obtain employment, but his efforts were guided and molded by his view that he wanted to be reinstated in his permanent position with the National Harbours Board and, thus, he did not make all the efforts that he would have made toward reaching a permanent satisfactory position if he had recognized from the outset that he would never be reinstated.

(*Rankin* v. *National Harbours Board (1981)*, *supra*)

[220] With respect to both the contingencies and mitigation, the Court thus rejected the search for an equation, accepting the English Court view that "One must try to assess. One cannot calculate."

[221] A second significant case from the Courts is *Cohnstaedt* v. *University of Regina*, [1995] 3 S.C.R. 451. The Supreme Court of Canada set aside a majority decision of the Saskatchewan Court of Appeal and substituted a judgment with a higher award of damages "substantially for the reasons of the dissenting judge, Mr. Justice Sherstobitoff." It is this dissenting decision that is therefore most

significant, although the majority judgment provides the facts and frames the issues (see *Cohnstaedt* v. *University of Regina* (1994), 113 D.L.R. (4th) 178 (Sask. C.A.)).

[222] This case involved a long and complex dispute between a university and a professor. By the time the case reached the point of this decision, the question was to what damages was the professor entitled for loss of his tenured position. The trial judge had assessed damages on the basis of the customary wrongful dismissal standard.

[223] An agreement had been reached for termination of the professor's appointment early in certain circumstances, or otherwise on the date of his normal retirement. The university sought to terminate on the earlier date, but in breach of the agreement. Sherstobitoff J.A. analyzed the issue this way:

> What, then, was the appropriate measure of damages for the breach of contract? It is trite law that the measure of damages is the amount which would put the aggrieved party in the same position as if the breach had not occurred. The measure of damages must be derived from the contract itself. As Matheson J. said in para. [52] of his judgment, quoted above, the agreement contemplated only two possibilities: early retirement on June 30, 1978 or normal retirement, which, as I have observed above, would have been on June 30, 1985. Thus, the agreement itself contemplated that if the appellant's employment was not lawfully terminated under its terms, and the Supreme Court has said that it was not so terminated, he was entitled to continued employment until his normal retirement on June 30, 1985. In other words, absent a proper assessment and a determination that the respondent was entitled to terminate, the appellant was entitled to employment for a fixed term. That being so, the measure of damages is the loss of salary and other benefits during the uncompleted portion of the fixed term. It is not the loss of income during a period of reasonable notice of termination to be implied from a contract of indefinite employment. This case falls within the ambit of the words of Laskin C.J.C. in *Red Deer College* v. *Michaels*, [1976] 2 S.C.R. 324 at p. 345:
>
> "... I have no doubt that there may be, and have been, cases where damages are fixed on the basis of a wrongful termination of a permanent employment. Counsel for the cross-appellants cited *Cooke* v. *CKOY Ltd.*, [1963] 2 O.R. 257; *Salt* v. *Power Plant Co. Ltd.*, [1936] 3 All E.R. 322, and *Lucy* v. *Commonwealth* (1923), 33 C.L.R. 229 as illustrative. ..."
>
> ...
>
> My conclusion is, based on the foregoing reasons, that the measure of damages, for the termination of employment in breach of the terms of the agreement, is the amount of salary and benefits that would have been earned by the appellant from date of the termination until the date of normal retirement, subject of course to any appropriate allowance for contingencies, and to the obligation to mitigate damages.

(*Cohnstaedt* v. *University of Regina* (1994), *supra*, pages 212–213, and 215)

[224] The Court's assessment of mitigation and contingencies in that case are described at page 217:

> There is no doubt that the termination affected the mental condition of the appellant to the extent that he was incapable of even seeking work for some length of time. In the absence, however, of any psychiatric, professional or other independent evidence, it is not possible to conclude that that was the case for all of seven years. On the other hand, the respondent made no effort to show that other suitable employment was available. One must also bear in mind that a sexagenarian professor who has been terminated for incompetence, and was embroiled in litigation with his former employer would have obvious difficulties in finding work as a professor at a university.
>
> Taking all of this into account, and having regard to the continuing obligation to mitigate his damages, it would be unrealistic to conclude that the appellant could not have found some financially productive things to do, given his age, intelligence, education and experience. There must be some reduction of the damages for failure to mitigate, and in the circumstances, I fix the amount of that reduction at one third. I realize that this is quite arbitrary, but the evidence is vague, and, as noted, the case must be brought to an end.
>
> No reduction in the damages for contingencies is warranted. The time to perform the entire agreement has passed, and we know that the appellant was available for employment throughout the entire period of time.
>
> (*Cohnstaedt* v. *University of Regina (1994)*, *supra*, page 217)

[225] The Cairns Group argue that, in their situation, there is no evidence that would establish any negative contingencies or of any opportunities to mitigate their losses through finding higher paying work. However, in *Cohnstaedt* v. *University of Regina (1994)*, *supra*, it is clear the Court made inferences from the facts available to it in assessing the various contingencies, particularly in adopting the view that Dr. Cohnstaedt could have found something financially productive to do.

[226] A third decision involves the measure of damages for the termination of a fixed term contract of employment; i.e. one not terminable on reasonable notice: *Freeman v. BC Tel*, 1997 CanLII 2191 (BC S.C.).

[227] The contract was to run for four years, but the defendant terminated the employee after about 18 months. The plaintiff sued for 39 months pay. The defendants argued for a reduction in the amount because of the contingency that the employment contract would not have survived to term in any event, and also because efforts at mitigation had been and would in future reduce the damages. It is in these respects that the case is significant, particularly since it deals with anticipated future events rather than an assessment on claims only up until the point of hearing. On the point about future contingencies, the Court accepted:

> [22]... where the evidence supports the suggestion an employment contract would not in any event have reached full term, a contingency factor for that event, in combination with any other appropriate contingency factors, may be taken into account in reduction of otherwise appropriate contractual damages. ...
>
> (*Freeman* v. *BC Tel*, *supra*)

[228] The Court, in accepting this principle, relied upon the earlier decision in *Rankin* v. *National Harbours Board (1981)*, *supra*. The Court elaborated on a variety of other factors that might affect such a contingency:

> [34] There is always the possibility of occurrence of many very minor events during the balance of any term contract following breach. Death, poor health, permanent or temporary disability, accident, bankruptcy of the employer, an employee leaving voluntarily for more remunerative or satisfying work, an employer re-negotiating a contract mid-term to increase compensation, or other highly unusual or catastrophic occurrences. Contingencies in context may be considered either positive or negative. They must of course be weighed and positive and negative contingencies offset.
>
> (*Freeman* v. *BC Tel*, *supra*)

[229] As to mitigation of the future salary loss (30 months), the Court said:

> [46] The loss of future salary, bonus and benefits from January 1, 1998 to July 1, 2000 (30 months @ $12,510.93 per month) amounts to $375,327.90. There must be a large deduction from that amount to accord with the reality of the likely mitigation that will occur. The major effort of canvassing employment opportunities, making his availability known to potential employers, networking with persons of knowledge and influence, establishing his own consulting business, and, of import, working to secure his doctoral degree, has been accomplished. The plaintiff is a person of capacity and value in the employment market. He has, apart from the present experience, enjoyed a full and remunerative work history.
>
> [47] Accepting in full his accumulated loss to date, a two-thirds reduction of future salary loss is appropriate. I therefore allow (one-third of $375,327.90) being the sum of $125,109.30 for future loss.
>
> (*Freeman* v. *BC Tel*, *supra*)

[230] The approach in each of these cases is to assess the remaining term of the fixed or indefinite contract. That term is then adjusted to reflect the contingencies that might reasonably interfere with that term; contingencies that relate to the employee's ongoing willingness or ability to continue that job and contingencies that relate to the likelihood of the job continuing to be available. They then factor in an estimate of the employee's ability to mitigate any loss through alternative employment. This estimate of available mitigating income over the longer term allows for recognition that there may be an initial transition period of unemployment or underemployment before a job is obtained,

recognition that a senior employee even obtaining a similar job, may earn less by starting back at the bottom of any pay scale, and that any employment obtained may be less secure, and thus more likely to be interrupted again in the future, than the former employment.

V–COMPENSATION IN GENERAL AND FOR THE FIVE TEST CASES

A–The Approach to Compensation for this Case

[231] The history of this litigation described in Part I establishes the breach upon which this remedy is based. Leaving aside the uncertainty over the CN flow back issue, the breaches relate to the terms in the initial CCAA that dealt with the selection of conductors and assistant conductors for merged positions, and the seniority provisions affecting those who qualified to become engineers.

[232] The initial remedy directed the parties to reopen negotiations and rectify this breach through a revised CCAA in a manner that protected the fundamental rights of those in the Cairns Group who could qualify as locomotive engineers. This they failed to do.

[233] The Board then went a step further. Decision 230 set up a two-part process, the second of which is now spent. The first began with the proposition that those who passed the qualifying tests should have received postings as locomotive engineers once positions became available. That meant without instead filling openings with junior VIA engineers or with engineers transferring in from CN. This was how the Board found "dovetailed seniority" should have been accomplished.

[234] At the time of Decision 230, all those who passed the testing process should, in the Board's view, have been so placed, in trainmen seniority order, in the ranks of the (by then) operating engineers. They were not. However, to put them in those positions, by the time of Decision 230, would have meant sending a significant number of transfer engineers back to CN, disrupting CN and VIA's operations and many individual careers. Instead, the affected employees were to be "compensated."

[235] The compensation contemplated by Decision 230 was expressed to be based on "the monetary value of the standards contemplated" in the previous part of the decision. It contemplated that, as far as calculations could allow, employees who would otherwise have been ordered into the positions that had opened up were to be put, monetarily, in the position that they would have been in had such a placement occurred. Despite able arguments to the contrary, the remedy in Decision 230 clearly indicates it was meant to be based on make-whole principles, modified only insofar as in-kind remedies in respect to positions already filed by others would be impractical. This approach was judicially reviewed and upheld.

[236] There are damages that flowed directly from the breach itself and damages that flowed from, or were added to, by the failure of VIA Rail and the BLE to negotiate the agreement the Board ordered (Decision 35) or to take steps to implement the Board's subsequent order (Decision 230 as varied).

[237] Had the Cairns Group claimants who qualified been put in the positions that training and dovetailed seniority would have allowed (as contemplated by Part IV of Decision 230), each person would have had the benefit of the job and the wages it attracted. The Board has set the presumed wage rate already, at the average earnings for the person's home terminal. They would also have had all the protections from lay-off their "trainmen seniority" would have given them.

[238] They would not all be placed at once, but could all have been placed that way some time before these hearings concluded. The Board ruled in paragraph 141 of Decision 230 as to how the date of each of their presumed recalls as engineers should be calculated. There is an issue, addressed below, as to just how that "matching process" should work. In most cases there would be a period when they would be on layoff from VIA, doing whatever work they were doing, pending a training opportunity with VIA. There is no right to compensation on account of lost wages during such periods.

[239] Had this happened, and assuming the individuals had actually qualified as trainmen (a contingency addressed below), these individuals would have worked for VIA as engineers rather than the junior VIA engineers or transferring CN engineers who in fact got the jobs. They would have had

the opportunity (again subject to the contingencies of life and work) to keep working through full careers. It might be argued that they could be dismissed for cause; that is certainly a contingency, but there is nothing to indicate that any of them were particularly vulnerable to that happening. They might have fallen ill or been injured. They might have been laid off; however with dovetailed trainman seniority they would have had seniority protection against that event. They might have been subject to a renegotiated collective agreement, but any such agreement that targeted them specifically would run afoul of the same issues upon which the initial breach in this case was founded.

[240] VIA asserts that all they are entitled to as compensation is the equivalent of a period of reasonable notice, based on the common law tests discussed above. That approach is rejected. It is based on compensation for a different type of breach. At common law, a person can be dismissed on reasonable notice, and the damage they suffer is based on the absence of that reasonable notice. These employees, had they been returned as contemplated, would not be liable to dismissal on reasonable notice, and that remedy simply does not fit the losses they have suffered.

[241] The Cairns Group argues that part of their damages might be calculated by analogy to the type of maintenance of income arrangements or severance packages that result from the "Notice of Material Change" provisions found in VIA's collective agreements and elsewhere in the rail industry. The Cairns Group claims include this as one head of damage amongst several. The Cairns Group's main reason for advancing this view is the tax advantages it may offer. Unfortunately, the Cairns Group has not established any principled basis on which such an award might be based. Industry experience is that such packages are custom crafted for the situation at hand and are quite varied. Sometimes they involve a combination of benefits like MOEs, structured severance packages and arrangements that provide bridging to early retirement. What this does imply is that it is appropriate to consider, in assessing any upper limit on damages, the type of settlement parties customarily negotiate in such circumstances, recognizing that job displacement is a possibility in any workplace and the employment relationship customarily ends with a settlement and release rather than an open ended guarantee of wages without work. Such settlement figures tend to reflect a "capitalized today's value" of likely future income, the burden of accounting for mitigating earnings, the contingencies of life and work and so on. However, at the same time, any such consideration

would have to recognize that such settlements normally involve all those subject to layoff, not just a select few as is now the case here.

[242] The arbitration cases described above have searched for, but failed to find, any commonly accepted formula for damages where a dismissal is reversed but reinstatement is withheld. Partly this is because some of that analysis is linked to the "cause like" reasons why the individual is not being reinstated (usually described as a complete breakdown in the employment relationship). Any "cause" aspect of this case falls on the respondents, not on the conductors. The law in this area simply fails to provide a workable framework for damages in this case.

[243] The cases that do provide such a framework are the Court decisions assessing the loss of an employee ordered reinstated, but nonetheless left unemployed. These include *Rankin* v. *National Harbours Board (1981)*, *supra*; *Cohnstaedt* v. *University of Regina (1995)*, *supra*; and *Freeman* v. *BC Tel.*, *supra*. Those cases derive from contract principles. The measure of damages, had the contract been performed, according to *Cohnstaedt* "is the amount of salary and benefits that would have been earned ... from the date of termination until the date of normal retirement, subject of course to any appropriate allowance for contingencies, and to the obligation to mitigate damages."

[244] This approach does not involve any unbridled grant of a lifetime income for no work. Both contingencies, and the obligation to mitigate, are very real and involve an assessment, however difficult, of what real and unavoidable damage the individual has or will continue to suffer.

[245] In this case, the breach is initially statutory. However, as the appellants noted and argued before the Federal Court of Appeal, what the Board essentially did in Decision 230 was impose statutorily compliant contract terms after the parties failed to negotiate such terms themselves. It then awarded a compensatory, rather than an in-kind, remedy for the breach of those terms. It is, for that reason, appropriate to look at a compensatory framework based on contractual principles.

[246] Adopting this approach addresses two other issues raised by the parties. The Cairns Group has maintained throughout that they should not be fixed with any duty to mitigate. That approach is rejected. Even in the decision in *Samuel John Snively*, *supra*, the Board accepted that monies actually

earned are to be offset against any award so as to prevent a punitive award for a loss that did not in fact occur. While a pending claim for reinstatement by the Board, due to an unfair labour practice, may alter an employee's obligation to seek permanent employment elsewhere, there is no basis for ignoring monies actually earned, or that could still, with reasonable diligence, have been earned in the circumstances.

[247] The second argument is VIA Rail's position that the Board has no jurisdiction to award damages for future loss; that any award can only involve proven losses to the date of Decision 230. Each of *Rankin* v. *National Harbours Board (1981)*, *supra*; *Cohnstaedt* v. *University of Regina (1995)*, *supra*; and *Freeman* v. *BC Tel.*, *supra*, involve an assessment of future loss. The Board sees no principled reason for that assertion that, if a party is liable as a result of an order, following a finding of a breach of the *Code*, that causes ongoing and future loss, they are absolved of responsibility for that loss past the point of the hearing. Certainly the Board's preference is always an in-kind make-whole remedy and such remedies stop the loss continuing. That was tried, resisted and, in Decision 230, abandoned as no longer practical. After Decision 230, it became a legitimate and more importantly continuing, head of damage, subject to an assessment of contingencies and mitigation. Up until that point, future loss could have been avoided; indeed, it could have been minimized even after that, had the respondents agreed to train and then place some or all of the remaining Cairns Group claimants voluntarily.

[248] Obviously, all the Cairns Group claimants are not equally situated. They differ in age and seniority, in the choices they have made so far, the contingencies that have or may befall them and in the mitigation they have been able to achieve or can be expected to achieve. They would have each been eligible for recall for a training opportunity at a different date. The whole point of the vacancy list and the eligibility list is to recognize this fact.

[249] The parties, however, disagree on what the Board meant when it ordered the creation of an eligibility list, a vacancy list and a matching process. VIA Rail's position is that all matching must take place on the basis of Terminal/District seniority. That is, each employee on the list of eligible claimants is only entitled to claim damages on account of a job opening they otherwise would have achieved with dovetailed seniority from their home terminal. VIA originally argued that such an

approach was essential, since some of the Group 2 claimants (who initially failed the testing and interview process) might later become interspersed with people in Group 1. Subsequent events removed that objection. VIA Rail argued that no vacancies that occurred after May 15, 2003, should be considered. This is merely a subset of VIA's argument that no post decision events can be considered. The Board disagrees, although it is mostly moot given the number of claimants left and the number of vacancies that arose before that date.

[250] VIA says, as a result of applying Terminal/District seniority, some would not have been recalled until after May 15, 2003. They would as a result only be entitled to be recalled for training, not damages. The Board notes that if this were so, VIA should thereafter have offered the employees training opportunities. This did not happen. VIA Rail and the BLE have been free, throughout, to agree to recall employees yet no such suggestion has been put forward.

[251] The Cairns Group raised an objection that VIA employees who returned to engineer positions after retiring ought to be treated as vacancies. The Board is not going to adjust the process for such events.

[252] The Cairns Group's assertions that eligibility listed claimants are to be considered for all vacancies is based on paragraphs 94 and 124 of Decision 230. At paragraph 94, the Board said:

> [94] The Board understands that mobility has traditionally been restricted within a seniority district. However, given the unusual effects of VIA's NEPO initiative, the Board considers that the general principle that conductors should be afforded every opportunity to be selected and trained should be foremost. In practice, this means allowing conductors to be considered for other seniority districts...

[253] VIA Rail maintains that this paragraph is eclipsed by Part V's "alternative remedy" approach. The Board disagrees. VIA Rail's approach would delay the recall date of some conductors and perhaps open earlier vacancies for a few others, each depending on the situation in their home terminal and district. The Part V remedies are not totally divorced from the Part IV discussion. The Board sees no reason why the order of assigning eligible claimants to opportunities should be any the less flexible, for those who receive damages in lieu than it was proposed to be for those who would in fact be recalled. Matching will be to any available position, not restricted by Terminal/District Seniority. The other issues, such as recall to home terminal after training and so

on, dealt with in paragraph 141(xi) do not need to be addressed. There are any number of speculative arguments that could be raised about which conductor might have used their seniority to the prejudice of another. As Decision 230 recognized, there comes a point where such interrelated contingencies pass beyond re-creation.

[254] Based on this general approach, and with these considerations in mind, the five individual test cases are now evaluated. Each was chosen, by the Cairns Group, to raise particular issues that may also apply to other claimants.

1–Paul Swim

[255] Mr. Swim's case most clearly illustrates the root issue in this case. He is qualified to work as an engineer at both CN and VIA. When, on July 1, 1998, VIA attempted to assign him to a locomotive engineer's job, it precipitated job action by CN engineers, also represented by the BLE, but in the CN bargaining unit. They felt they were entitled to the job ahead of Mr. Swim, who was very low on the CN engineer's seniority list. As Mr. Swim described it:

> I reported to work at approximately 17:20 and, upon arrival at the VIA Station, my car was surrounded by a dozen or so CN Engineers (NOTE: CN Engineers stand for all permanent vacancies at VIA Rail; moreover, VIA Engineer jobs are highly coveted by CN Engineers at the top of the seniority list. The fact that I had been requested to fill this vacancy would have been of particular concern to the Engineers as I am almost at the bottom of their seniority list). Chris Smith approached my vehicle and informed me that while he and the other CN Engineers had nothing against me personally, they would not allow me to work as a VIA Engineer on a permanent job because the position should have been advertised at CN.

[256] His situation thus had nothing to do with training; it was simply a straight clash of seniority claims between junior VIA Rail employees who were or were hoping to become VIA Engineers and more senior CN Rail employees who had pre-existing seniority rights against those jobs that the BLE had failed to bargain around, or override, when it assumed the obligation to represent the VIA Rail conductors.

[257] However, Mr. Swim's case is also illustrative of the other side of the coin, from the point of view of the engineers at CN. Mr. Swim was a CN engineer, but low on the seniority list. As he describes his earlier situation at CN:

> I have been employed with CN Rail since 1973—as a Trainman (since 1975), then as a Conductor. In 1981 I qualified as a Locomotive Engineer. At CN I worked mainly as a Conductor or Trainman, and sporadically on a trip-to-trip basis as an Engineer. In 1995, after the "May 5th" agreement was implemented in Atlantic Canada, I could no longer hold work in Moncton and therefore took Edmundston as my new temporary home terminal. After working there for approximately two months, I was recalled to the Moncton Terminal. With the uncertainty of work with CN as a Trainman in Moncton, I chose to transfer to VIA Rail during the Fall change of time in 1995. I worked at VIA as an Assistant Conductor and Conductor (and occasionally as an Engineer) until June 30, 1998 when, due to VIA's crewing initiative, all Conductor positions were terminated.

[258] Put simply, Mr. Swim left his low seniority engineer's position at CN to take conductor work at VIA. From the perspective of more senior CN engineers, he was seeking to "jump their queue" and use the choice to transfer as a conductor as a shortcut to get what, for CN Engineers, was the "highly coveted" VIA Engineer's job. This observation is not to debate the merits of rulings long since made. However, Mr. Swim's case puts into perspective the conflicting feelings of entitlement between railroaders, particularly within the broader BLE. It is a direct consequence of long standing but unusual interlocking seniority arrangements between what were originally two crown corporations.

[259] Mr. Swim testified to the events outlined above and to his career with CN, VIA and again with CN. He was born in 1955. He began work with CN in July 1973 working in the freight shed. In 1975, he transferred to the running trades. While he began in the 5th seniority district, he later transferred to Moncton, in the 7th seniority district. His CN Rail running trades seniority date was July 5, 1975. He remains in Moncton. He qualified as a conductor in 1978. In January 1983, he qualified with CN as a locomotive engineer following a six-week course and 10 months on the job training. He worked as an engineer running passenger and freight trains between Moncton and St. John, New Brunswick. His work as an engineer was mostly on the spareboard, where calls came in unpredictably, when other engineers were not available. As a conductor, he had regular work out of Moncton.

[260] In December 1995, Mr. Swim transferred to VIA, also in Moncton. He thus had relatively short seniority directly with VIA. He held a conductor spareboard position that gave him two days off per week. They ran only two trains per day, each involving a 6-8 hour tour of duty. He found that this routine at VIA improved his family life considerably and he enjoyed the work.

[261] In the Spring of 1998, since he was already a trained engineer, VIA provided him with the additional NEPO training he needed for the newly created position through a course in Halifax. He worked his last day as a conductor on June 30, 1998. When given his check-in form he chose to become a locomotive engineer. He wanted to remain with VIA because of the pay, the working conditions and the advantageous pension.

[262] Mr. Swim testified to what happened to him when he was scheduled to take up his duties as a VIA Rail locomotive engineer. The crew officer called him at 2:30 p.m. in the afternoon and told him that he and another employee, Wayne Lester, were being set up permanently as locomotive engineers. He understood that the BLE was opposed to this step, but VIA told him the Company would not back down.

[263] When he reported for work, his car was surrounded by a dozen or so CN engineers, who were protesting the fact that Mr. Swim had been asked to fill the vacant locomotive engineer's position at the Moncton terminal. Their position was that the senior CN engineers were entitled to bid on and take the position. It was the local BLE chair who told him the CN engineers had nothing against him personally but would not let him take up the position. He suggested Mr. Swim go home and phone VIA to tell them he could not get out of his car because of the protest.

[264] He later got a call from the trainmaster asking if he could take a trip, boarding the train about one mile out of town. He arrived to do so. The police were there. The local BLE chairperson was standing in front of the train, and the trainmaster from VIA was on the engine. The BLE representative intended to stand in the way of the train unless the job was advertised at CN. He was subsequently removed by the police.

[265] Mr. Swim was again told by a senior VIA manager that VIA did not intend to back down. However, the two vacancies had been created by the decision of two senior VIA engineers having decided to take the NEPO 50/30 pension offer. These individuals were persuaded to change their minds, selecting a regular pension instead and, Mr. Swim believes, receiving a significant payment for so doing. Mr. Swim attributes their change of mind, over taking early retirement, to their BLE loyalty and their wishing to ensure that other CN locomotive engineers had priority for the job.

[266] Thereafter, Mr. Swim and Mr. Kostler called senior VIA Rail officials almost daily about their position. They were told that VIA did not intend to bring over CN employees when they already had qualified VIA Rail employees.

[267] Mr. Swim returned to CN right after the Picher award. He experienced layoffs at CN from October 3 to December 17, 2000, and January 20 to April 14 and April 22 to May 25, 2001. The reasons Mr. Swim was selected as a sample case were:

> Mr. Paul Swim is on the priority list. We are claiming, inter alla [*sic*], a loss of earnings on his behalf as well as loss of employment opportunities as a NEPO engineer. We will also claim full losses for any other employment related benefits that he would have received had he been afforded the opportunity to work as a NEPO engineer (including, but not limited to, VIA's pension, etc.)
>
> We will be claiming on behalf of Mr. Swim that he should be afforded a full Maintenance of Earnings ("MOE") as well as damages for the circumstances under which he was removed from VIA while working as a VIA Rail Engineer up to September 1998. ...

[268] The Cairns Group seeks to distinguish those trained as engineers, and referred to as being on the priority list, from the others who qualified for training. The BLE and VIA take the position that Decision 230 creates no such distinction. It relieves conductors already trained from any further testing process, but thereafter simply places them, along with those who pass the tests, on to the eligibility list.

[269] To accede to the Cairns Group submission in Mr. Swim's case would see his receiving priority (because of his prior training) over the other and more senior members of that group who, in the Board's view, should have had the opportunity to train and to also work as engineers at VIA. That is an inconsistent approach not supported by any language in Decision 230.

[270] The "priority list" no longer has any significance. The decision to award compensation rather than a job placement, made in Decision 230, applied equally to those who were already trained and to those who the Board found ought to have been trained. With respect, the Cairns Group is rearguing a matter already decided. Clearly any hardship to VIA in placing Mr. Swim in a job is lower than for those still in need of formal training, but that was known at the time of Decision 230. The Board agrees with VIA's submission: "The reason priority list employees do not get preferential

treatment is straight-forward: it is not what the Board ordered." Paragraph 141(vi) and (xii) is clear. It says (once again):

> [141] ...
>
> (vi) Conductors who are not working as qualified locomotive engineers and who are on current priority lists are not required to repeat the test (even if their passing mark was below 60%) and are to be included on the eligibility list set out below.
>
> (xii) Conductors who have become qualified locomotive engineers since July 1, 1998, and are working as locomotive engineers at VIA shall have their seniority dovetailed, by terminal or seniority district, as the case may be, where they are presently employed. They shall be entitled to retroactive compensation covering any loss of earnings and benefits resulting from their inferior seniority rank as if they had been trained and qualified on the date the first former conductor successfully completed the locomotive engineer training program.

[271] Mr. Swim was on the priority list, and was included on the eligibility list without the need for testing. He was not working at VIA as a locomotive engineer, even though he feels, as a result of the events of July 1998, he ought to have been. All the facts now relied upon were known or available to be argued before Decision 230 was rendered. Mr. Swim's compensation will be dealt with in the same manner as the other persons on the eligibility list. This has the effect of leaving him (despite his training) as junior to his untrained co-workers who had greater seniority and ought to have been, but were not, provided with a training opportunity.

[272] The one consequence of Mr. Swim's already being trained is that there is no room, in his case, for the argument that he might have failed to qualify following a period of training, an argument VIA Rail advances in relation to all those who were not trained.

[273] The Cairns Group seeks damages for the circumstances under which he was removed from VIA in September, 1998. While those circumstances were no doubt unsettling and traumatic for Mr. Swim, and their aftermath of contact with both the BLE and VIA frustrating, they are not matters that fall within the scope of the breach upon which the remedial award is founded. That claim is therefore rejected as beyond the purview of this award.

[274] Mr. Swim will be compensated for his wage loss from the date of his matching to a vacant position on the basis of the average earnings of an engineer at the Moncton terminal less his earnings

from his ongoing employment at CN and any other employer, on a total income basis (i.e. not year to year), to the earlier of his retirement date from CN if retired, his severance date if he has otherwise left CN's service, or July 5th, 2010. That date is selected since he would by that point have reached age 55 and his 35th anniversary of service. Compensation thereafter is inappropriate since in all probability he would by then retire.

2–George Cairns

[275] Mr. Cairns began work with CN in Toronto, Ontario, in 1974. He changed his home terminal to Windsor, Ontario, in 1985 to obtain more passenger work. He transferred to VIA Rail on May 5, 1987, working as a conductor based in Windsor until July 1, 1998. The Cairns Group selected Mr. Cairns as a sample case for the following reasons:

> 5. George Cairns
>
> We are putting forth Mr. Cairns as an example of an employee who had to relocate in order to mitigate his damages as much as possible. At the very least Mr. Cairns is entitled to the full relocation payments which VIA has refused to pay to any conductor who relocated. The Board will recall the evidence involving Mr. Roger Scarrow who was never paid his relocation monies.
>
> We have provided a synopsis of particulars on behalf of Mr. Cairns. In addition to everything set out in this synopsis, we will be requesting that Mr. Cairns be granted money for any loss of earnings and damages for loss of an employment opportunity as a NEPO locomotive engineer. Mr. Cairns has passed the BMT and interview. Mr. Cairns was obviously one of the conductors who were forced to return to CN Rail where he continues to work today. We will also claim the difference in his pension differential.

[276] The synopsis provided in respect to Mr. Cairns' claim for relocation payments read as follows:

> ... Prior to transferring to VIA Rail, his CN home terminal was Windsor. In August 2000 he was to declare to a position at CN Rail. At that time in Windsor, the only position his seniority afforded him was a position in Yard Service, not Road Service. Considering the difference in earnings between Yard Service and Road Service, George declared to Sarnia in order to work in Road Service, the same service he was working in at VIA, where the earnings are higher.
>
> He then commuted to Sarnia from Windsor for about 3 months until he was able to sell his house. His house sold October 2, 2000 and then it was necessary to rent accommodations until he purchased a house in the Sarnia Area.
>
> Claiming—Relocation Allowance of $25,000—this is the amount that VIA paid to employees who qualified as engineers in accordance with the CCAA and NEPO and relocated to work as an engineer. In the case of G. Cairns, because his home terminal at VIA was Windsor, he would have had to relocate to the GTA to work at VIA in Toronto upon becoming qualified as an engineer and therefore entitled to the relocation allowance at VIA.

> VIA may argue that he relocated voluntarily to work at CN, however, considering the difference in earnings between working in Windsor in Yard Service and working in Sarnia in Road Service, his claim for loss of earnings would greatly out weigh his claim for relocation and additional there can be no dispute that he would have received a relocation allowance from VIA to relocate to the GTA.
>
> Claiming Rent for accommodations from October 2, 2000 until December 2000 when he got possession of his house.
>
> Claiming a commuting allowance from August to October 2000.

[277] Mr. Cairns provided testimony and documents to support the need for and cost of his relocation. This is a topic dealt with specifically in Decision 230 at paragraph 126:

> [126] For those conductors involuntarily sent back to CN as a result of the arbitrator's decision, and who were required to change terminals at CN to maintain employment, but did not receive a relocation benefit which they would have received in the normal course, they should be compensated for this transfer by receiving a relocation allowance of $25,000.
>
> (emphasis added)

[278] This paragraph is contained in Part IV of the decision. Part V decides that people like Mr. Cairns shall be "entitled to seek compensation in lieu of the redress" (see Decision 230 at paragraph 141 (x)). As noted earlier, paragraph 126 is a remedial observation. It does not say conductors are entitled to such an amount under the collective agreement (or the CCAA), although the Board clearly used that clause, by way of analogy, in setting the appropriate amount of compensation.

[279] Mr. Cairns transferred from Windsor to Sarnia so that he could earn more from his job at CN. VIA maintains that this was only intended to apply to conductors who actually went to work as engineers and had to move to do so. Mr. Cairns' move "was not necessary to maintain his employment," but it was necessary to maintain his level of income. The amount, $25,000, for relocation is not unreasonable given Mr. Cairns' evidence about his reasons, the time and trouble it took and the sale transactions involved. The approach in Decision 230, to use the collectively bargained sum as a rough measure of damage, is appropriate in Mr. Cairns' case. The respondents insist, rightly so, that mitigating income must be taken into account in any compensatory award. What follows is that reasonable costs incurred to mitigate can also be granted if properly claimed

under the Board's previously ordered claim process. On either approach, Mr. Cairns is entitled to be compensated, and under either approach, $25,000.00 is an appropriate amount.

[280] In his oral testimony, Mr. Cairns also explained the circumstances that entitled him, while employed at VIA, to a Maintenance of Earnings (MOE) guarantee due to the earlier elimination of a passenger service on which he was employed. He seeks to have that continued. VIA maintains that such MOE payments are not transferable from VIA to CN, although the Cairns Group takes issue with that. There is no express basis in Decision 230 to carry over, or to continue to fix VIA Rail with, this guarantee.

[281] However, the Board has established the average earnings at the employee's terminal as the rate to be used when comparing earnings. The Board's view is that this terminal average calculation should legitimately include MOEs. This is obviously a rough and ready approximation for what the Cairns Group—Group 1 member might be expected to receive had they actually been returned to work. It is not appropriate to alter that basis by attempting to account separately for individual MOE's. To the extent Mr. Cairns is already entitled to be compensated for the difference between his earnings at the two employers, the amount is already subsumed in the overall claim, albeit somewhat disguised by the fact Mr. Cairns was able to earn more at CN than at VIA, although for work he found less agreeable. Mr. Cairns' claim in respect to the MOE is not granted.

[282] Mr. Cairns was not qualified to operate as an engineer without training. The Board accepts VIA Rail's position that, for those who passed the interview and tests, but still needed to successfully complete a period of training, a contingency should be applied to recognize the possibility that they might have withdrawn from the process finding it disagreeable, or might have failed to attain the necessary certification. Given the vigour of the testing and interview process, that contingency is assessed at 5%, to be applied to the average earnings at the person's home terminal. In Mr. Cairns' case, the income he earned by returning to CN exceeds, and may be expected to continue to exceed that figure. He is therefore not entitled to damages specifically for loss of income.

3–Scot Matheson

[283] The reasons Mr. Matheson was selected as a sample case were:

> Mr. Scot Matheson was a pure VIA employee. He is still working as a VIA employee. We are claiming a loss of earnings on behalf of Mr. Matheson. Mr. Matheson passed the BMT and interview.
>
> We have included two pages of particulars on behalf of Mr. Matheson. Since Mr. Matheson remains a VIA employee, the Respondent Employer is well aware of his situation. Nonetheless, we have enclosed voluminous documentation supporting all of Mr. Matheson's submissions.
>
> We will be claiming a MOE on behalf of Mr. Matheson. We will also be claiming damages on behalf of his original MOE which was improperly cancelled by VIA. We will also be claiming a relocation allowance on behalf of Mr. Matheson. We will be claiming the differences [*sic*] between the pension that Mr. Matheson would have earned had he been given an opportunity as a NEPO engineer versus the pension that he is likely to receive when he retires from VIA.

[284] Mr. Matheson began his career with VIA Rail in London, Ontario, in January 1985, as a Customer Care Agent. In his first five years with VIA he worked a series of jobs, in London and then Toronto. He is fluently bilingual; an ability that meant he could bid on runs not available to unilingual employees. Some of the positions he worked in involved training other employees. On July 3, 1990, he took up a job as a brakeman under the UTU collective agreement in the conductor's bargaining unit which he held until the implementation of NEPO. He was fairly low on the seniority list in Toronto due to his short service. When he transferred into the UTU unit, he lost all his accumulated seniority to that point. His trainman seniority therefore dates from July 3, 1990, but is not reflective of his total service with VIA.

[285] As a "Pure VIA" employee, Mr. Matheson had no option to move to CN. He was never offered an onboard service manager job after NEPO. When given options by VIA, he chose training as an engineer as his first option. He viewed this as a natural transition from the conductor's position. The other options were layoff benefits for a year or a severance payment of $75,000.

[286] He wrote the Bennett Mechanical Test and then underwent an interview. He was told he had failed the interview and was therefore laid off. He was told to go to his union for help finding alternative work with VIA. He was able to convince management to let him work as a ticket office salesman. This meant a significant reduction in pay (going from $55-60,000 down to $35,000 per

year) and the loss of all his UTU seniority. After working at that job for 18 months, he looked around for other opportunities. He found a position available in the maintenance section in Vancouver as a locomotive attendant. The work involves marshalling locomotives within the limits of the yard. Again, he lost all prior seniority.

[287] Mr. Matheson took the Vancouver job because of his ongoing wish to get trained as an engineer and because he considered the sales position as "going ten steps back" in his career. He also had personal and compelling reasons to seek work in British Columbia if at all possible. Unfortunately, the Vancouver position was only temporary. To keep himself employed with VIA, Mr. Matheson sought and accepted work in a variety of clerical, sales and support positions. At some point, he accepted and performed janitorial duties just to avoid lay-off and stay employed. He says he changed jobs up to 60 times in eight years.

[288] He grieved the initial interview result and sometime later, in an arbitration, was given a second chance, but once again failed the interview. Later, he took the test and interview mandated by Decision 230 and passed. He has not received any training opportunity, although he drives locomotives as part of some of the jobs he does in Vancouver. Mr. Matheson's evidence is that VIA has hired at least four new trainmen in Vancouver since he has been there.

[289] Mr. Matheson's seniority district, as far as Decision 230 is concerned, is Toronto South, not Vancouver.

[290] The Cairns Group asks for special consideration in Mr. Matheson's case. He has personal and compelling reasons for wishing to stay in Vancouver, known to the parties and found compelling by the Board. It urges, unlike the other claimants in the Cairns Group, that he now be provided with a training opportunity. This would involve a minor reconsideration of Decision 230 and those decisions that followed. The reason Decision 230 did not order an in-kind remedy, was in large part the fairly widespread disruption it would cause if all those in Group 1 were suddenly returned to VIA. Much of that disruption would have been to CN. Few of those factors apply in Mr. Matheson's case. As a pure VIA employee, he never had the right to go to CN, so there would be no disruption to that workforce. Further, at the time of Decision 230, the Board contemplated a much larger group

of engineers being affected, a number significantly reduced by the eventual test results. At worst now, a senior engineer in the CN unit might have their opportunity to bid over to VIA delayed. The BLE, in its submissions, say that:

> 45. ... if the Board should determine that such an opportunity is within its jurisdiction to award, the TCRC [ex BLE] would be prepared to cooperate, if necessary, with VIA Rail in implementing any such award.

[291] VIA's position is that to provide Mr. Matheson with a training opportunity in BC would be to treat him preferentially, since seniority is not portable from one district to another. In the Board's view, there are certain circumstances where such rules can be waived with the union's consent to accommodate special needs. More pointedly, VIA argues, any such training "opportunity should be in lieu of all compensation or monetary award."

[292] In the Board's view, Mr. Matheson's case justifies an exception to the general approach otherwise adopted in this case. VIA is directed to offer Mr. Matheson the first training opportunity that arises in the British Columbia region in any location that realistically allows Mr. Matheson to maintain his residence in the province. This offer is to be ahead of any offer of a vacancy to any CN Engineer, senior or not, to Mr. Matheson's trainman seniority. In the event, for any reason, Mr. Matheson does not become a qualified engineer as a result of this training opportunity, he shall be entitled to revert to his current position and seniority under his current collective agreement.

[293] The Board is not persuaded that this remedy should be in lieu of damages for the time Mr. Matheson has spent employed with VIA in other capacities and not in an engineer's position. As with Mr. Cairns, the Board finds a discount on account of the chance Mr. Matheson might not have achieved engineer status is justified and at a higher 12% rate, to be applied to the lower of the average terminal wages of Toronto or Vancouver. This recognizes the difficulties Mr. Matheson had with the tests he took earlier. However, it also recognizes that Mr. Matheson has, since that time, actually operated locomotives on behalf of VIA.

[294] Given that the earlier rulings, for Mr. Matheson's case alone, are reconsidered to allow this remedy, further consideration of his wage loss, including the assessment of future contingencies other than the contingency already set, will be deferred and quantified once his future employment

is known. He is, in the interim, to be forthwith paid a sum on account of lost wages, based on the formula above, from the date of his eligibility for recall to training under Decision 230, to December 31, 2008.

4–Doug Dillon

[295] The reasons Mr. Dillon was selected as a sample case were:

> Mr. Dillon will represent the category of employees who severed, elected to take a pension or received a pension from VIA. Again, we have provided a synopsis which sets out Mr. Dillon's particulars as well as all of the documentation referred to above.
>
> We will be requesting that Mr. Dillon receive additional compensation on the basis, inter alla [*sic*], that he now has to work at least 60 hours per week to come close to earning a decent wage that a VIA locomotive engineer would earn by working forty hours per week. Even then he only earns a portion of what he would have earned had he been given the opportunity to become a NEPO engineer. We will be claiming additional damages on behalf of Mr. Dillon on account of loss of work opportunities as a NEPO engineer as well as putting forth the position that the severance monies that he received should not be factored into this situation in any way, shape or form.

[296] Mr. Dillon is a third generation railroader. He began work for CN in 1965 and, in 1980, began to work on passenger traffic, as a brakeman, flagman and as a conductor when his seniority allowed. In 1987, he transferred over to VIA Rail when it assumed responsibility for passenger service. Between 1987 and 1998 he worked as a conductor at VIA working out of Winnipeg and travelling runs to Watrous, Dauphin and Sioux Lookout.

[297] Mr. Dillon described the election form he received from VIA Rail following the NEPO initiative and how he assessed the various options, given his personal situation. He could stay with VIA and seek to qualify as a locomotive engineer. He could revert back to CN, retire, or take a severance package. His perception at the time was that reverting back to CN was not a viable option. He understood CN was vigourously denying that any such reversion rights existed. If he were to be trained as a locomotive engineer, he would go to the bottom of a long seniority list, which he viewed as an unrealistic option.

[298] If Mr. Dillon took an early retirement his pension would be reduced by $2,500 to $3,000 for the rest of his life. At the time, had his employment not been interrupted, he felt he was on track for a much higher pension.

[299] Mr. Dillon says he was not aware, at the time he completed his election form, that VIA was going to provide salary protection during its dispute with CN over reversion rights. When the letter advising him of this later came, he understood the wage protection was just going to be for the duration of the dispute and not for the duration of his career. He agreed however that the election form followed the negotiation of the CCAA, and that the protection letter was negotiated on the same day as the start of the window period for completing the election. He also understood the three conditions for the protection; being an eligible employee with reversion rights, making an election to return to CN, and being hired back by CN. Mr. Dillon's view was that it was too risky. CN did not want the VIA Rail employees back and might win its case. He was influenced as well by the ongoing animosity between the BLE employees and the former conductors, and his view that the former UTU representatives had "just thrown up their hands."

[300] Mr. Dillon says at the time he consulted a financial advisor. He was advised that the country was in a good financial state and he would do far better with his money if he invested it privately. As a result of this advice he took a severance package. He also took the commuted value of his pension and had his financial advisor invest it for him. The market then fell and he did not make the money that had been predicted. He now has a pension of only $2,500 per month.

[301] Mr. Dillon detailed the financial terms of his separation as follows. He took the commuted value of his pension: $645,692 by transferring $462,900 to an RRSP account and taking $182,000 in cash. He received $96,000 in severance which was $50,000 plus two weeks wages for the first year plus one week for every year after that.

[302] At the time of this decision, his pension was going to be about $3,900 per month, plus a $350.00 top-up per month and $200.00 per month from the severance package. At age 65, he would then collect just the $3,900 per month.

[303] Over the ten years since he left VIA, Mr. Dillon has worked with a short line, the Central Manitoba Railway. He started with them as Operations Supervisor. Initially this was a part-time job paying $30,000 per year plus a truck. He says they grew the railway quickly and he became Operations Manager earning an additional $10,000 per year. They built a repair shop in Transcona. He was then promoted to General Manager, a position which became more and more demanding, with calls at night and similar demands which led to health issues. His doctor advised him to leave that position. He says he was working from 60–70 hours per week for half the pay he received at VIA. He only received four weeks' vacation, of which he was only able to actually take about two. He was then asked to work under a contract. He now works under a contract for the Prairie Dog Central Railway. This, he says, is more of a volunteer organization. He earns just $2,000 per month. He still has to work to earn money because of the reduced state of his pension. Mr. Dillon testified that, in addition to his other losses, his decision to leave VIA cost him his rail pass for life.

[304] Mr. Dillon agreed that he was aware that the collective agreement had certain early retirement bridging credits and that this was not a new concept for him. At the time of his election, he was 52 years old and was eligible for early retirement in three years, and that in the interim he could collect 65% of his basic rate of pay. In addition, he understood he could receive a separation allowance based on his 31 years of service amounting to 37 weeks pay in a lump sum.

[305] Mr. Dillon agreed he qualified under the 50/30 formula for an enhanced pension option. The CCAA agreement provided two different amounts; $3,600 per annum plus a varying award dependent on age. These two top-up amounts were payable until age 65.

[306] Mr. Dillon's situation is coloured by a series of contingencies and choices personal to him. He made two elections when VIA set out his options in the face of NEPO. First, he decided to take a severance package and, as a consequence, not wait to see if he had transfer rights back to CN. Second, rather than leave his pension monies in the VIA Rail pension plan and receive an early retirement pension, which he was free to do, he elected to take the commuted value of that pension. He did so, on the basis of professional financial advice, which in hindsight proved disastrous for him. He traded a certain and predictable income stream for investments which, by their nature, were subject to the vagaries of the market.

[307] The Cairns Group argues that, since Mr. Dillon has worked in the railroad industry for more than a decade since leaving VIA, it is proof that he would have continued working with VIA as an engineer, had he had the opportunity to do so. The Board finds that conclusion doubtful. Mr. Dillon's continuing to work in the industry has been a result of two things; his financial reversals and his ongoing interest in the industry, most recently through essentially volunteer work with the Prairie Dog short line.

[308] When NEPO was announced, Mr. Dillon clearly had retirement in mind; perhaps not immediately, but in the near term. Mr. Dillon had inquired about a bridging opportunity in 1996. The Cairns Group seeks to characterize this as "just an inquiry," but correspondence from the UTU to VIA at the time suggests he in fact applied and pressed to have his application accepted. The Board finds from his evidence that, had the financial circumstances been right, he would in any event have taken a retirement package rather than opted for retraining as an engineer. The Board finds it would not have taken a lot more severance to persuade him in any event to retire early. This favourable outlook towards retirement influenced his decision not to elect to go back to CN. He maintains he did not know of VIA's commitment to maintain his income until the flow-back rights were settled. The evidence suggests he in fact knew, or with reasonable care, would have known of that guarantee. Certainly he took the uncertainty of the results of the dispute with CN into account in arriving at his decision but that factor, and others that might have kept him there, were outweighed by what he felt were the better financial prospects of severance.

[309] At the time of his severance, Mr. Dillon was 53 years old. He had worked for 32 years, mostly with VIA. He did not have long to go before he would have been eligible for regular pension or at least to have been able to take advantage of any bridging offers that might have facilitated early retirement.

[310] In Mr. Dillon's case, the approach to damages outlined above would see a short horizon for when he might have been expected to retire. He also consciously severed his employment when (a) VIA was willing to protect his income pending the flow-back decision and (b) returning to CN would have protected much of his income until he was ready to retire.

[311] The Cairns Group complaint in this case about the adequacy of the CCAA negotiations and re-negotiations have throughout emphasized the lack of training opportunities and the refusal to dovetail the seniority list. However, they have also maintained that the bridging and severance options were inadequate. In Mr. Dillon's case, the most probable result, even if the opportunity to train and retain a dovetailed seniority had been on offer, is that he would have chosen to accept a bridging or enhanced retirement package had it been on offer instead. He took a package he felt to be inadequate because the prospects of returning to CN or of getting to be an engineer at VIA were low.

[312] The Board finds it appropriate to assess Mr. Dillon's damages at what it finds he would likely have taken as a retirement package even if a retraining opportunity had been a realistic prospect. This recognizes that, even if retrained, he might have had to wait for the training to be complete and an engineer's opportunity to become available. It also recognizes that VIA and the BLE, had they re-negotiated the CCAA as Decision 35 contemplated, would have probably made additional provision for people in Mr. Dillon's circumstance, if only because of the significant dollar cost to VIA of the training, and the short horizon, in Mr. Dillon's case, during which that training would be of benefit to VIA.

[313] The Board assesses Mr. Dillon's damages, based on these considerations, at $20,000.

5–Terry Wood

[314] The reasons Mr. Wood was selected as a sample case were:

> Mr. Woods is one of the medically restricted employees. He was medically restricted after passing the BMT and interview. We have provided a page and a half of additional particulars on behalf of Mr. Woods which sets out his situation. Since Mr. Woods should have been afforded the opportunity to work as an engineer, we will be claiming all losses in connection with such up and including the date that Mr. Woods would be expected to retire as a VIA locomotive engineer. We will be claiming additional damages on behalf of Mr. Woods since VIA refused to accommodate him.
>
> [*sic*]

[315] Mr. Wood's situation was complicated by a number of legal strings becoming entwined, just at the time of NEPO's introduction. First, Mr. Wood was injured at work at VIA. Second, Mr. Wood chose locomotive engineer training but was turned down. Third, while he went to CN and worked there for a while he was soon injured again. Fourth, he was throughout covered by Workers Compensation legislation. There, proceedings took VIA to be the workplace employer (with a duty to re-employ) for the first injury. They treated the second injury, which occurred while Mr. Wood was at CN, as a re-injury linked to the earlier VIA injury. They provided Mr. Wood with income replacement insurance for a period. They also gave him a 19% pension for a permanent partial disability. Given this mix, it is hardly surprising that Mr. Wood received inconsistent advice and felt that he was getting lost in the shuffle.

[316] The mandate of this decision is to assess damages as a result of breaches of the *Code* based on the earlier decisions. The Board has no plenary jurisdiction to sort out everything that befell Mr. Wood. Decision 230 at paragraph 141(x) provides that:

> [141] ...
>
> (x) ... Conductors who were not able to qualify or apply for locomotive engineer training because of a medical disability shall be entitled to compensation without the need to fill a vacancy.

[317] There are only two other brief references to remedial issues involving medically restricted employees in Decision 230:

> [84] The conductors submitted that medically restricted employees who could not qualify because of the change in duties be accommodated at their home terminal.
>
> ...
>
> [103] The Board has also given consideration to the situation of the three medically restricted conductors who may be unable to undergo training. While it was perhaps possible to accommodate them by means of lighter duties within the train, it may not be possible to accommodate them with respect to locomotive engineer duties. However, since the medically restricted conductors were part of VIA's normal workforce on July 1, 1998, they should have been accommodated and not simply left to fare for themselves at CN. They should, therefore, be compensated accordingly.

[318] The decision appears to accept that it may not be possible for them to be accommodated in the locomotive engineer's position. The decision says they should have been accommodated within VIA's normal workforce. With the NEPO initiative, the locomotive engineer's position was all that

realistically remained within the BLE bargaining unit. This suggests any such accommodation, if available, might well have to be through other work, in a non-union position, or in another bargaining unit such as the CAW unit.

[319] The duty to accommodate reflects the responsibility of employers not to discriminate on the basis of physical disability. This can be avoided if an employee is accommodated, but that obligation ends at the point of undue hardship. However, the applicable Workers' Compensation legislation also requires the worker's employer to reinstate the worker after an injury, with accommodation if needed. Accommodation need not be perfect, may require concessions by the employer, the employee and an affected trade union, and need not involve income maintained at the employee's former salary if the employee is only capable of performing lower paying work.

[320] In order to settle Mr. Wood's compensation, arising out of this claim, and as distinct from his rights to Workers' Compensation, his story needs further elaboration.

[321] Mr. Wood's uncle worked for CN at Toronto's Union Station. In 1987, Mr. Wood took a job with CN as well working in the running trades in the UTU unit as a brakeman and yardman. In November 1988, they both chose to go to VIA. Mr. Wood bid on an opening on the spareboard. Later, VIA cut his job and he reverted back to CN for a time, where he also worked on the spareboard. CN then posted an opportunity to train as a locomotive engineer for which he applied and was successful. At the same time, VIA Rail called and asked him if he would accept a recall. At that point he had not quite reached the conductor level with CN. He was told by VIA that they were going to start training their own locomotive engineers and that, because of this, he could safely accept a recall. He therefore accepted VIA's recall and worked as a conductor, hoping one day to train as an engineer.

[322] On July 31, 1997, Mr. Wood was injured while working as a baggage man with VIA, suffering one herniated and one bulging disk. He was off work and on compensation for one day short of a year. He was ready to return to work in July 1998, but by then the NEPO initiative was underway. Mr. Wood elected just two options on VIA's form; first to be trained as an engineer and second to

return to CN. He was told he would have to undergo a physical examination. In July 1998, when he was ready to return, VIA took the position that there was nothing for him to do.

[323] VIA had selected some conductors for training and had told all the rest of the former conductors that they should stay home, on full pay, pending the results of the Picher arbitration over CN's obligation to accept them under the 1987 agreement. He was told by VIA in September 1998 that he had not been selected for the training process. He understood that his managers had a round table and that he was turned down as unsuitable for a combination of medical and attitudinal reasons. He never saw a document called a "work habit assessment" but this played a significant part in VIA's refusing him a training opportunity. He grieved the failure to select him.

[324] While out of chronological order, the Board notes that Mr. Wood's case was forwarded to arbitration, but without his being aware of it. The BLE advised him by letter that his case had failed and that he was going to CN. He called the BLE representative in Toronto and asked what happened. They told him he had not been contacted because they did not know where to reach him. By then, the appeal period had passed, and he was on the list to return to CN.

[325] In April 1998, as Mr. Wood was recovering from his injury, the Ontario Workplace Safety and Insurance Board (WSIB) contacted VIA to determine what modified work was available, given his medical restriction. VIA's initial response was that VIA, as the accident employer, no longer had the job of assistant conductor and as a result there may be no work for Mr. Wood to return to.

[326] While the Picher flow-back decision was pending, Mr. Wood continued to deal with the WSIB claiming his injured worker's statutory right, once able, to return to his accident employment, either in his original job, or in a suitable position with accommodation. Mr. Wood and his then union, the BLE, took the position that he had a similar right under the *Canadian Human Rights Act*.

[327] A WSIB Physician's Progress Report, dated August 28, 1998, indicates that Mr. Wood was examined by a physician on that day. The report indicates that "this man has essentially recovered functional capacity." It says complete recovery is expected and that he is "now ready for work assessment." Under the heading "list any medical restrictions that should be observed should the

patient return to work activities now," the doctor answers "no repetitive lifting of weight in excess of 15 kgs." The report suggested a workplace functional assessment be performed.

[328] On August 31, 1998, Mr. Wood attended and passed a medical examination arranged by VIA Rail at Medisys. That report certifies "health stands compatible with the job requirements." No restrictions are listed. The WSIB record suggests that they continued to press VIA to return Mr. Wood to active employment. The case worker's record reports the position being taken at that time: (IW = injured worker - Mr. Wood, AE = Accident Employer - VIA):

> I called Serge Rivest of the AE & confirmed that, as of the 23Nov98Form 26, the IW has ben [*sic*] able to return to his regular work. The IW had already faxed to Serge the 23Nov98 Form 26. The IW agrees that he is fit for his pre-accident duties. The medical precautions suggested on the Form 26 are simply as a precaution to avoid future recurrence with regard to possible repetitive "heavy" lifting. Thus, the IW is fit for his pre-acc duties.
>
> Serge indicated that the IW will therefore be placed back on the AE's payroll as of 24Nov98. The IW will not be working at VIA Rail, but simply awaiting the ruling of the arbitrator in the employment dispute. The IW is one of the employees who is affected by this arbitration matter.
>
> Serge confirmed that the IW had called him and apologized for his inappropriate and rude comments in the conference call we had about 2 weeks ago.

[329] Mr. Wood spoke to representatives of the BLE who told him he was going on the return to CN list and should just wait. He spoke to WSIB and they said VIA had to give him his job back. He said "he would write to VIA and they would delay matters by taking three months to reply." He was also told by VIA that he should remain at home, but with pay, until the Picher award came down.

[330] After some delay, Mr. Rivest, VIA's Senior Claims Agent, wrote to Mr. Wheten who was by then helping Mr. Wood and another employee with VIA and the WSIB, outlining its positions. The letter read, in part:

> As you know, on July 1st, 1998, VIA merged the positions of train conductor and locomotive engineer on all passenger train operations. VIA also reduced the operating crew complement to two (2) employees with both positions located in the cab of the locomotive and VIA required that both of these positions be qualified locomotive engineers. This being the case, as well as the fact that the two (2) locomotive engineer positions assumed the operating duties of the former train conductor position, including the handling of checked baggage. The restrictions that currently applies [*sic*] to Mr. "A" and Mr. Wood as train conductors would also affect their ability to perform the duties and responsibilities of the current locomotive engineer's position. Furthermore, Mr. "A" and Mr. Wood are not considered for training as locomotive engineer based on their previous work record at VIA.

> In conclusion, neither of these former train conductors are suitable to be trained as locomotive [*sic*], notwithstanding that their current medical restrictions for the train conductor's position would equally apply to the current locomotive engineer's position.

[331] Mr. Wood's statutory rights to return to work at VIA were due to expire in July 2009. Mr. Wheten, the BLE Chairman of the Provincial Legislation Board for Ontario, wrote to the WSIB, with copies to VIA, setting out Mr. Wood's case. These included the following points:

> 1. Training for and working as a locomotive engineer involve the same physical demands.
>
> 2. Freight service (presumably alluding to the proposal to return Mr. Wood to CN) is much more physically demanding than the work on passenger trains.
>
> 3. The requirement that locomotive engineers assist with baggage handling does not amount to a prohibitive restriction because:
>
> a) Most VIA trains do not handle baggage, particularly in Mr. Wood's territory.
>
> b) Handling baggage does not have to involve repetitive lifting of heavy bags; carts and sliding bags assist.

[332] The letter also suggests, and Mr. Wood confirms, that in December 1998, VIA had advised that Mr. Wood would be entering the locomotive engineer's training course in early January 1999, once the holiday season was over. Mr. Rivest then advised, in January, that VIA, without any explanation, had "changed its thinking." Mr. Wheten also advised that:

> ... because of similar situations, our Brotherhood is appealing VIA's decision to disqualify Mr. Wood and certain other individuals from the locomotive engineer training program to an arbitrator. We do not believe that there were uniform standards used to select candidates and that personality conflicts played a part in the process.

[333] The results of that challenge are noted above.

[334] The letter again complained of VIA dragging out the process and of a failure to meet with the WSIB, the union and Mr. Wood. It closed by saying:

> We feel that communicating through letters, as has been done up to this point, is ineffective and time consuming, and we are concerned that we will be delayed beyond two years from date of accident and VIA will no longer be obligated to re-employ as per Section 41(7) of the Act.
>
> For all of the aforementioned reasons we ask that Mr. Terry Wood be re-employed at VIA Rail and that he be enrolled in the locomotive engineer training program. In the very least he should be allowed to participate in a W.S.I.B. work trial in this position to decide whether or not he qualifies.

[335] A mediation was scheduled for July 21, 1999, in Toronto, Ontario, for which Mr. Wheten prepared an extra submission on Mr. Wood's behalf. A planned further meeting was not held and nothing was resolved in this process. The Board notes, however, that Mr. Wood was very well represented during this process and everything that might be advanced in his favour was presented with clarity. Unfortunately, VIA's replies lack any clearly responsive statement as to why, even if he could not be accommodated in an engineer's position, some other position might not be made available or at least tried. VIA appears to have simply assumed, despite the WSIB's position, that any accommodation would and should become CN's problem once the flow-back matter was resolved.

[336] Mr. Wood received a phone call from VIA in December 2000, following the Picher flow-back award. They told him he had to decide, in 72 hours, to report to CN or he would lose his job. He still thought at the time that he was to return to VIA under the duty to accommodate. He was told that, if he did not accept the CN recall, he would lose all his seniority. Mr. Wood argued that VIA was required by law to return him to work. CN told him they knew nothing of that, so he showed up for work at CN.

[337] Pausing at this point, Mr. Wood's position is only different from the other members of the Cairns Group in one respect. That is, he had an injured worker's right to return to VIA in an accommodation position.

[338] Like the others, he wanted to be trained as an engineer but faced a denial of training and the prospect of bottom down seniority. Like others similarly situated, he showed up at CN to take advantage of his flow-back rights. At this point, Mr. Wood was 34 years old with trainman seniority dating from June 2, 1987.

[339] He reported back to CN at Windsor, his old home terminal, although he was living in London at the time. He was assessed as being subject to medical restrictions. He was placed in the yard operating a belt-pack. He lasted in Windsor for five weeks when he was forced to Toronto on a manpower shortage.

[340] On July 27, 2001, while working as a coach switcher, Mr. Wood was reinjured. The WSIB classified this as a re-injury, relating to the earlier VIA Rail injury. VIA opposed this ruling but without success. Mr. Wood remained off work from CN thereafter. He underwent a Functional Capacities Evaluation on July 3, 2002. The clinic was given three CN job descriptions; Brakeman-Yardman, Conductor-Foreman and Locomotive Engineer. The only CN job he was found physically able to do was that of locomotive engineer. CN would not accommodate him in that position. Since June 2003, he has been on layoff from CN in Windsor, Ontario. The WSIB placed him in the Labour Market Re-Entry Program and he also took some upgrading classes.

[341] An April 27, 2006 letter from the WSIB to Mr. Wood details his ongoing workers compensation benefits:

> I am writing to provide you with a summary of your Workplace Safety and Insurance Board (WSIB) benefits, medical precautions and entitlement.
>
> Your claim was established on July 31, 1997 where you sustained an injury to your low back while working for Via Rail Canada.
>
> As a result of that accident, you incurred a permanent impairment to your low back and were awarded a 19 per cent non-economic loss (NEL) award.
>
> Your permanent medical precautions are as follows:
>
> • You are to avoid any heavy lifting tasks requiring lumbar flexion such as reaching into bins, over table or from deep shelves, to avoid bending or twisting, avoid repetitive or sustained above shoulder task. You will require frequent breaks from static postures for example no prolonged sitting or standing or walking, no low level work, no heavy pushing or pulling against resisting or twisting. No repetitive trunk movements regarding your low back.
>
> Because your medical precautions were significant, they limited your ability to return back to your pre-accident job or any type of alternate work.
>
> You were assessed and awarded for a future economic loss (FEL) award and you are in receipt of FEL benefits which are locked in to June 1, 2031 when you turn 65 years of age.
>
> If a worker is in receipt a FEL benefit [*sic*], they are also entitled to receive benefits for loss of retirement income upon reaching the age of 65. The Act stipulates that the WSIB set aside additional funds equal to

10% of every FEL payment made to a worker. In your case, you will be entitled to the Workers' Retirement Pension once you turn 65 years of age.

[342] In June 2006, Mr. Wood had to stop working due to a re-injury of his spine. An MRI indicated his injury was severe, worse than before and would continue to deteriorate. He attempted to find casual work through a temporary employment agency. He had to abandon his efforts at self-employment by running a trucking business.

[343] Mr. Wood remains enthusiastic about being trained as a locomotive engineer at VIA. This is what he says he initially signed up for and would take such an opportunity "in a heartbeat." Physically now he says he is "100% and healthy as a horse." He has no doubts about his ability to train for and to drive a train. He says many people in relation to whom he is senior have become locomotive engineers.

[344] While VIA maintains Mr. Wood is not and has not been physically capable of driving a train, Mr. Wood maintains the CN belt pack job was much more physical, requiring him to handle the belt pack, which is worn on the chest, while also changing up to 100 switches a day.

[345] VIA's position is that any compensation for medically restricted employees is really a consequence of VIA's duty to accommodate employees with a disability. That obligation is not to maintain the employee at their former salary level, but to seek out and provide suitable alternative work (up to the point of undue hardship), and to pay the employee the rate for that job. This, VIA maintains is not only the law but part of its overall Duty to Accommodate policy and has been its custom and practice. The Board has reviewed that policy and accepts it to be so. VIA Rail says, at most, he should receive compensation at the rate applicable to employees in an accommodation position which, in its view, is at either the Yardmaster or Service Manager rate.

[346] In Mr. Wood's opinion, he is "caught between a rock and a hard place" in that VIA denies he is fit to work as a locomotive engineer and refuses to accommodate him in that position. He cannot perform the work of a brakeman and yardman at CN. Mr. Wood found himself in an unenviable position after NEPO was announced since it overlapped with the time when employees were waiting

for the Picher flow-back decision and waiting for a further decision over their rejection for VIA Rail training. Clearly the two issues got mixed together. He was rejected for the initial training for what he perceived to be medical and attitudinal reasons. His grievance on the issue was frustrated, but that is not properly a part of this claim.

[347] Mr. Wood went back to CN. There he was restricted somewhat in what he could do, but that was a matter between himself and CN. On July 27, 2001, while he was still working at CN, he was reinjured. However, this was found to be a re-injury, the loss from which, and the obligations to rehire from which, fell to VIA as the employer at the time of the original accident. At least, the responsible body for deciding such matters, the WSIB, adopted that view. Mr. Wood's evidence is that VIA was contacted several times to arrange employment for Mr. Wood under accommodating measures as necessary, but they declined to employ him in any capacity.

[348] VIA received the medical report suggesting he was, at the time, capable of doing the locomotive engineer's job at CN. VIA still declined any further employment, retraining or accommodation measures. Mr. Gregotski gave evidence about the physical demands on VIA engineers now, with luggage handling responsibilities. Only one of the two engineers has to perform that task. Given all the evidence about Mr. Wood's condition, however, the Board is not satisfied he was physically able to do the VIA engineer's job at any time or that their failure to so employ him, with our without modifications, was a failure to accommodate his physical disability.

[349] Subsequent re-injury and the deterioration in his condition support that position. Mr. Wood is optimistic about his abilities, as he appears to have been throughout. However, the medical assessments suggest that it is not just lifting that presents a problem, but also sustained sitting and standing. The Board accepts that the locomotive engineer's position is not only demanding but also a highly responsible position with important standby duties in the event of unexpected emergencies.

[350] The question, given all this, is how "compensation" for Mr. Wood, should be calculated. As noted above, at the outset, he was in essentially the same place as every other able bodied Cairns Group claimant. However, soon after he suffered a re-injury that rendered him unable to work in the manner he had done before. It is argued, on Mr. Wood's behalf, that had VIA offered

Mr. Wood a training opportunity and subsequent work as an engineer he would never have been re-injured at CN. In the Board's view, that is too remote and unforeseeable a consequence to give rise to compensation directly. It also sounds very like an action against the employer of the kind precluded by the no-fault aspects of workers compensation.

[351] Mr. Wood is to be compensated as follows. The income Mr. Wood would have been entitled to receive is to be based not on the average earnings of a locomotive engineer at his terminal, but on the similar earnings of a yardman. This is because, had he remained with VIA he would been placed in an accommodation position, not offered a locomotive engineer's training. Compensation for any shortfall in his earnings shall be calculated from the date of his arriving at CN up until June 2006. At that point, the Board finds Mr. Wood would have been, in all probability, too disabled even for an accommodation position. However, the period during which Mr. Wood was receiving compensation payments based on the 90% of income rate will be removed from the calculations. No WSIB benefits paid on account of that period will be deducted from his compensation under this award. Any non-economic loss payment made on account of his personal injury will be counted in mitigation. Any other WCB economic loss payments, outside of the 90% period, will be counted as mitigating income, but calculated on a year by year basis, not cumulative. This is because he should not have counted against him in mitigation any workers compensation coverage for any period that (because of his time of injury employment) was higher than an accommodation position at VIA would have yielded.

VI–CONCLUSION AND RESERVATION OF JURISDICTION

[352] This decision has addressed general principles and five test cases selected by the Cairns Group as representing those cases necessary to point the way to settlement for the balance of the claimants. The Board directs the parties to undertake the calculations necessary, based on these conclusions, to finalize a statement of entitlement for each of the five test cases. In the event they disagree on any amount or calculation necessary to this process, the matter will be referred initially to a Board officer for resolution and, failing that, to the Board to quantify the final amounts.

[353] The Board has not addressed the issue of lost pension entitlements for those cases in which it is still a live issue. The Board reserves jurisdiction to address that aspect of the case further once the other calculations are complete. The Board also, once again, reserves jurisdiction over all other remedial matters in this case. The Board is hopeful the parties will use the test cases and general principles described above to bring this matter to an acceptable resolution.

Andew C. L. Sims, Q.C.
Vice-Chairperson